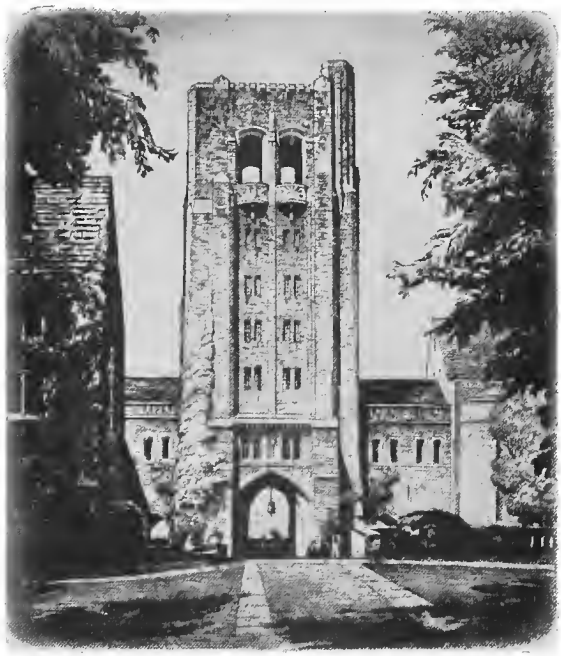

# JURISPRUDENCE

OR THE

# PRINCIPLES OF POLITICAL RIGHT

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*LECTURES DELIVERED BY*

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# EDITOR'S NOTE

THE task I have undertaken in the editing of the Lectures on Jurisprudence of the late Professor Herkless has been one from which I have derived no small degree of pleasure, knowing that I was thereby lending my assistance to placing in permanent form some portion of the results of the labours to which he devoted his life. The task has not by any means been of an onerous nature. I have confined myself to the mere consideration of the arrangement of the Lectures, and have made only those variations from the MSS. which seemed necessary before they could be cast into form for publication. I have adopted this course, since the circumstances that have prompted the issue of the book have rendered it unnecessary for me to express any critical estimate of the subject matter of the Lectures, or the manner with which they have been dealt. I only trust that his innumerable friends and those students to whom they were delivered will welcome the volume, and find in its perusal an additional incentive to the continued study of a most instructive department of science.

A. W.

EDINBURGH, *23rd May* 1901.

# MEMOIR

"A spirit inviolable that smiled and sang
By might of nature and heroic need
More sweet and strong than loftiest dream or deed."

DURING the last five-and-twenty years no name was more familiar at Gilmorehill than that of William Robertson Herkless; for so long a period, in some way or other—student, graduate, reformer, examiner—he was associated with the University. And his activities were the more piquant and impressive from his physical disability, which might have doomed the most ambitious to a purely sedentary part. He was born in Glasgow on the 13th of April 1849. His father, a native of Musselburgh, who acquired a name as an engineer, was a man of excessive diligence, and to the last degree painstaking at his work; besides genial, candid and affectionate, peculiarly valued as a friend. His mother is a Glasgow lady, the sister of Dr Alexander Robertson, a well-known specialist in diseases of the brain. The Professor of Ecclesiastical History in the University of St Andrews is his younger brother, and his only sister is married to the Rev. John Wellwood, minister of Drainie.

Owing to a congenital defect, Willie, though otherwise of good physique, was never able to walk; yet he was a

little despot in the family, exercising to the full the usual prerogatives of the eldest, and inventing more. His intellectual tastes developed late; but if the stories of his boyhood were told, his friends would smile to see the future leader of so many academic battles in the picture of the child, brows drawn and crutch in air, giving the word of command to a submissive army. From his force of character as well as from his delicacy he had it all his own way at home, and as he had for years refused to learn to read, because he did not see the use of reading, so, when he took the fancy of going to college, there was no restraining him from study. And education tamed the boy: in the man the strong will remained, and native dignity, and a just self-confidence; but the gentleness of Herkless was a known thing.

Prepared by private tutors, he entered the University in 1868. In the curriculum of Arts, owing to the state of his health, he did not try for prizes, but the good students, at least the men of mind, and chiefly those of a certain stamp, were his natural friends. For with the feeling of the true scholar he venerated the ancient seat of learning, and was most drawn to those who were loyal to its spirit. Indeed he was peculiar among undergraduates for the interest which he took in the University as an institution. From the day of his first matriculation, proud to be a student, and wearing his gown and trencher with an air, he was nothing if not academic. He never missed an opportunity of asserting the rights of the student body; now it was the abolition of the Nations, now the revival of the Comitia. To see him joining in the Gaudeamus was to discover the emotion that went of old to the name of Alma Mater. He shared in the whole life of the place, and was everywhere a man of mark, from the Dialectic, of which he rose to be president, to the rectorial elections.

In 1874 Mr Herkless and two or three others, disgusted with the triennial party battle, resolved to nominate a man of letters. One morning in spring, six months before the election, they startled Gilmorehill by announcing, as the candidate of the Independent Club, Ralph Waldo Emerson. In a group of four, championing against both political parties "the American Plato," there is to be seen the peculiar audacity of Herkless. Urging the claims of Mr Disraeli, who was then Prime Minister, the Conservatives, under the scarcely veiled patronage of the Senate, held up the lure of government gold. What with that, and the cry of atheist and alien, the contest was probably the most bitter and exciting in the annals of the College. The Emersonians put on the air of apostles, and would hear of nothing but culture, the higher life, and immortality: their speeches were sermons; their war-song sounded like a hymn. Tories and Liberals went bawling to the tune of Marching through Georgia—

> Down with savage Ralph, boys, and sour his Oversoul;
> Keep him in his woods, boys, with possums to condole.

Yet in the midst of the fight the Liberals withdrew their candidate, Mr W. E. Forster, in despair. Disraeli got in with seven hundred votes, as against five hundred recorded for Emerson. Twenty years before, Carlyle, then nearing the height of his fame, received only sixty votes. The better fortune of his friend against worse odds was mainly due to Herkless, who, as president of the Independent Club and editor of the University Independent, for three weeks spent his days in the quadrangle issuing orders and receiving reports, and sat up half the night hatching plans and writing articles. In recent years, if the contest were recalled, he would laugh; yet, in spite of much that may have been absurd in the pose, the enthusiasm was noble, and not without significance in his mental history.

Connected with this affair there was one circumstance which proved to be of some moment in the life of Herkless —his acquaintance with Dr Hutchison Stirling. In the formation of the Independent Club the philosopher had accepted the post of honorary president, and it was through him that Emerson had consented to stand. An alumnus of Glasgow, and a sympathetic man of genius, Dr Stirling took an interest (partly amused, perhaps) in these evangelists of the Oversoul, and between him and their leader the correspondence ripened into friendship. Herkless was already well grounded in logic and psychology, as taught by Veitch, and had collated with various text-books the lectures of Edward Caird; but now, under a fresh inspiration, he began to read philosophy in earnest, especially Kant and Hegel. More than anything else, however, he was the disciple of Stirling, whom he always regarded as the first of philosophical critics, and as having the best metaphysical head of any Scotsman since David Hume. He knew all his master's works (the marginal notes show how well), but went beyond them in studying what he most affected, viz., law, morality, and the state.

For several years after his graduation in Arts, Mr Herkless, still wanting a vocation, attended classes for the mere love of the College, whose very stones were now dear to him. Hitherto he had idle hours, sacred to literature and friendship, and would go in summer upon driving-tours, in which he was the most light-hearted of companions. In 1877 he and a friend lived together for two months in a Highland hut, in such weather that they could not venture out one day in seven: as they lay asleep, a raindrop in the ear was no unfrequent summons, and in the silent night the drip upon the stone floor was like the ticking of a clock. Yet they passed the time in laughter; never a shadow of difference arose between them, nor was one moment of

ennui felt by either. But in the following year he slipped into a system of life in which there was no place for leisure, and which lasted till he sank into his grave.

A new Law Faculty having been instituted, Mr Herkless saw another goal, the degree of LL.B., to which he was the more attracted as his private studies had fitted him to shine in the curriculum. Competing for the first time, he took the foremost place in Jurisprudence, International Public Law, International Private Law, and Constitutional Law and History.

At the same time he was much occupied with the subject of university reform, little knowing that he had engaged in a struggle which would cost him the best ten years of his life. The cause was one in which he, more than any of his fellows, was prepared to lead; and, in fact, students went to him with their grievances as the academic sage. Not, like others, pressing on to a destination, he took the more to do with his surroundings, till at length, while his old companions were passing away to their professions, there was nothing nearer his heart than the welfare and honour of the University. As a patriot he winced at the sight of Scottish students fleeing to England to complete their education. He acknowledged, of course, that Oxford and Cambridge must always have the advantages of wealth, but he held that the morbid condition of the Scottish universities was mainly owing, not, as the Senates alleged, to want of funds, but to bad organisation. Dissatisfied with the evidence given before the Royal Commission of Inquiry, whose Report was published in 1878, he plunged into the reform movement. Besides keeping up an agitation in the University Council, he wrote a pamphlet, more a treatise, which appeared first as a series of articles in the Glasgow Herald, and, in 1884, was issued under the title of Scottish University Reform, the Main Problem and its

Solution, with an Appendix on University Government. This was the grand source of the revolutionary changes which we now behold. The next step was the formation, in Glasgow and Edinburgh, of University Council Reform Associations. The former, with Mr Cochran-Patrick for president and Mr Herkless for secretary, rapidly grew till it numbered more than a thousand members. Under its auspices a bill, which was to be introduced into Parliament, was drawn up, embodying all the principles and most of the details of the scheme, alike of graduation and of government, advocated in Mr Herkless's book. Nine-tenths of that bill, according to the Glasgow Herald, was incorporated in the Scottish Universities Act of 1889. Dr D. C. M'Vail, the constant companion of Herkless in the struggle, writes: "He was, of course, the most active member of the University Council Association. His work and views ran through the whole of its proceedings. No other member had so great a share in it; no other man did so much hard work in university reform." Mr Herkless was one of the most important witnesses before the Executive Commission, which he had probably some hand in getting empowered to take fresh evidence. He travelled to London (no small thing for him) as a deputy during the progress of the Universities Bill. For the rest, through a course of years he was daily at his desk from noon to midnight, often with a severe headache. In the evening some of his coadjutors might call — doctors, lawyers, clergymen—and then, as the good stories went flying, his laugh would be among the merriest. He had married in 1883 Margaret, the only child of the late George Knox, of Glasgow, and she was the greatest help to him in his labours.

As year followed year, and he was still absorbed in this movement, some of his old friends, no enemies to reform,

thought that Herkless was wasting his life. Nor yet, perhaps, were they satisfied when, on the top of the victory, he accepted the Chair of Scots Law in St Mungo's College. This institution, which had recently been founded by the managers of the Royal Infirmary, was so disfavoured by the university set, that there was little hope for the Faculty of Law. Mr Herkless, however, prized the appointment, and, in his preparation of lectures, was as laborious as if the units in his class had been so many hundreds. His students loved him as a man; and that strange power over others, which he had possessed from childhood, was seen in their desire to serve him. They revered him as a teacher who, when they regarded law as merely a practical study, opened their eyes to its spiritual foundations. Besides class lectures and casual articles, Mr Herkless wrote the introductory part of a text-book on The Law of Mercantile Agency, and what was more characteristic, a considerable portion of a treatise which was to be called The System of Scots Law. Eminent advocates, partly by his writings, more, perhaps, from personal acquaintance or oral report, appraised him as a legal scholar of no common attainments, with a firm grasp of principle and a singular mastery of method. That he was capable of making an important contribution to political or legal theory none who knew him can doubt; but the present work, which consists of lectures delivered to students of both sexes, and not meant for publication, has been chosen as the fittest for an immediate memorial, such as was desired.

Mr Herkless died on the 31st of January 1900, snatched away in the midst of duties to which he was devoted, and from a work that was to be his monument. He was remarkable both for what he did, and for what, that he might live as others, he endured and overcame. In the various

fights he led, his associates counted on his moral courage and tenacity of purpose, but they were apt to forget, what indeed he least desired them to remember, that these qualities were required for his mere existence in an arena of affairs. If, then, what he achieved was enough for distinction and honour, there surely went to it the stuff of heroes.

J. W.

# JURISPRUDENCE

OR THE

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## INTRODUCTORY

JURISPRUDENCE may be provisionally defined as the science of the human will, in the distinction of the particular from the universal, and in the relation of the particular to the universal.

This definition is provisional in the sense that it assumes as already determined what depends for evidence of its truth on explanations which have yet to be made, and on an argument which has yet to be followed out. But the definition is not therefore to be supposed doubtful as to its being safe for present acceptance. What is set forth in the definition is really the conclusion to be come to, on a survey of the ground that has to be gone over, although for convenience the conclusion is here made the starting-point.

Let it be postulated, then, that the human will is the subject-matter of jurisprudence.

The methods of inquest or investigation appropriate to any science are of course determined by the nature of the subject-matter of the science. The subject-matter, for instance, of pure mathematics makes demands, as to the

treatment of it, very different from those made by the subject-matter of geology, say, or botany. There is an element of identity as between science and science, even in respect of the nature of their various subject-matters. Were this not so, science could not with proper warrant be the common designation of this, that, and the other species of intellectual pursuit or research. There is consequently an element of identity among all the methods employed in science, whatever may be the peculiarities which mark off each method from the rest. The element of identity thus indicated consists in reason or thought looked at, on the one hand, as constituent or essence of all that is, and looked at, on the other hand, as the instrument by which the crude material presented to the mind is shaped and built up into knowledge.

Thought is capable of turning on itself, so as to be at once its own subject-matter and its own instrument. Thinking on thought—*νοήσις νοήσεως*—is the proper business of philosophy. The method of philosophy is the speculative method. This method is forced on philosophy by the very necessity which gives rise to philosophy. The speculative method is distinguished from the empirical method. The latter is the method of every special science. In regard to these contrasted methods, it may be sufficient to note here the briefest explanation. The speculative method represents the dialectic movement of thought. Setting out from the mere notion of being, thought passes dialectically, by alternate affirmation and negation, to one category after another, till it completes the whole system of the categories. The empirical method, on the contrary, begins with experience and proceeds on hypothesis. It observes, collects, compares and generalizes. In this way it brings a mass of given particulars into rational order and rational coherence. As applied in the case of a special

science, the empirical method presupposes, not only the existence, but also the validity, of all the categories which it needs. The crucial difference, indeed, between science and philosophy, over and above the difference of their methods already noted, is just this: that science makes certain assumptions which it does not pretend to go behind, whereas philosophy has for its task to justify the assumptions of science, and therefore all the legitimate superstructure. The speculative method of philosophy is thus required to validate the empirical methods of special science and to give the cohesion and the character of necessity to scientific results. In so far as any scientific result is true, it must find a place in the recognition of philosophy. The results of philosophy, for their part, all hang together in a network of necessity, so that no science, be its subject-matter what it may, is able to discredit any truth of philosophy.

Jurisprudence rests on the distinction between the universal will and the particular will. Examples may no doubt be quoted of eminent authorities who never refer to the distinction at all, or who refer to it only to deny its truth. But those who make no mention of the distinction either imply it, or, along with those who avowedly reject the notion of a universal will, fall short of science in their treatment of the subject-matter. It is one thing to observe such or such forces to be operative in law, to set them forth as co-ordinate or as subordinate in relation to one another, and to stop there. It is another thing to reduce these forces to unity by showing that they flow from a single principle. However near the approach to science may be in the former case, it is only in the latter that science is reached. There is no other single principle than will to which the phenomenon of law can be reduced.

# CHAPTER I

## REASON

A GREAT light went up in the ancient world when Anaxagoras[1] put forward the theory that νοῦς, mind or reason, governed the universe. He had faced anew what had been the problem of many previous thinkers in Greece, and he gave an answer which had not been dreamt of in their philosophy.[2] Aristotle describes him, in comparison with earlier speculators, as a sober man among random babblers.[3] Aristotle, indeed, is his critic as well as his panegyrist, and points out that, although Anaxagoras made mind the principle of the universe, he nevertheless made mind a mere machine for the production of order and system, and thus in effect deprived the principle of its vitality as the efficient cause.[4] In urging this objection Aristotle may be taken as following Socrates ; for Socrates, as represented by Plato, expresses deep disappointment that Anaxagoras did not demonstrate the genesis of nature from reason, but left the principle of reason an abstract principle, instead of showing it to be a substantial principle, creative of all that exists. But the discoverer of a principle is not to be held of small account because he does not

[1] Perhaps anticipated by Hermotimus of Clazomenae ; *cf.* Aris., *Met.*, i. 3.
[2] *Ibid.*
[3] Aris., *Met.*, i. 3 ; *cf.* note to Schwegler, pp. 375–6.
[4] Aris., *Met.*, i. 4.

grasp the full import of his own discovery. He is not to be disparaged because he fails to apply the principle he has enunciated to the matter which it concerns, in a way to satisfy the demands of later thought.

What actually is—the material universe, that is to say —exhibits a structure and a cohesion of parts, a complexity of constitution, an order in detail, and an order, on the whole, which answers or corresponds to reason. Put in this way (and it is the true way to put it) the doctrine of Anaxagoras does not involve our recognition of the causal or imaginative force of reason. It does not involve such insight into the nature of mind or spirit as is involved in perceiving the universe to be the intelligible product of a rational process, the manifestation on the concrete outcome of the necessary activity of reason. But, all the same, the epoch-marking achievement of the thought of Anaxagoras is beyond the power of speech to exaggerate. Once it has been said that reason rules the world, even if no more be meant than that the visible system of things reflects the reason of the individual observer, the further revelation of the cosmic secret is assured. Reason must come to disclosure on the grand scale, no less certainly than in the individual, as self-conscious reason.

A natural object (a rock, say, or a river) has actual being in space and time. It passes out of one state, through another, into another. But the rock or the river does not know that it exists. It does not know that it changes. It exists not for itself, but for some mind. There is, however, another mode of being,—what we call self-conscious being. I am, and I know that I am. I undergo changes, and, not only do I know that I change, but I know also what the changes are. I exist therefore for myself. I am conscious or aware of myself. I am knower and that which is known in one. In other words, I

am subject and object in one. But there are objects which lie outside of myself, and which yet I somehow know. How, then, is it possible for me to stand in conscious relation to outward objects? The question here is not about the physical means by which impressions from without are conveyed to the mind and wrought up into the inward matter of knowledge. The question is this: all the physical conditions that are necessary for the apprehending of outward objects by the mind being taken for granted, what is the ultimate condition, as to the nature of the outward objects, on which the reduction of such objects into the grasp of the mind depends? The answer is, that a self-conscious being can stand in conscious relation to outward objects only because he and they—only because thought and things—are in substance one and the same. Thought and things are abstract opposites; but the antithesis between them is capable of being annulled, because of their fundamental identity—things being reducible to thought, not thought to things. Thought is able to reach out to things and is able to hold them in its grip. Thought can do so, because things really express thought.

Self-consciousness implies, on the one hand, difference between subject and object, between self and not-self. It implies, on the other hand, a reduction of the object into identity with the subject. Thought is able to establish this identity, without destroying the difference; and thought alone is able to do so.

A self-conscious being, then, is a being that thinks. A being that thinks is a being that, through the categories or universals of thought, converts objects, and ultimately every object, which as it is presented is external and therefore particular, into oneness with the thinking subject itself.

Such a being is man. The nature of man, therefore,

and what man does, come to be chief among the primary interests of science. Jurisprudence is only one of several cognate sciences, which all lay one another under contribution, and which all make man their concern. Psychology may be considered the root science of them all. Psychology is properly the science of the facts or phenomena of self. Its subject-matter is the states of consciousness of the individual human being. The individual mind is often figured as a bundle of separate faculties, not dependent in any vital sense on one another, although of course connected in an external way by their all being parts of one and the same mechanism. The cognitive faculty, the faculty of knowing, is in this view quite distinct, and quite isolated in its exercise, from the faculty of feeling; and both of them are in like manner distinct and isolated from the faculty of will. It is only when psychology limits itself to the method of introspection that knowledge, feeling, and will are thus made to appear so many separate constituents of the same consciousness, if not, indeed, so many different kinds of consciousness. When psychology avails itself of all the methods of investigation at its command, it is able to show that each of these three modes of consciousness involves the other two. There can be no knowledge without a putting forth of will, in order to bring the object within apprehension or grasp; and through perception of the object a pleasurable or a painful affection of the self comes about. There can be no feeling apart from some activity of the self, which activity, in its turn, depends on knowledge of what is aimed at and how it is to be reached. Finally, there can be no volition, in the absence of feeling to stimulate it, and in the absence of knowledge to guide and direct it. Knowledge, feeling, and will are, in fact, the different phases or sides presented by every consciousness, according

to the point of view from which it is observed. This substantial unity of consciousness, of the self, is apt under analysis to be lost sight of, or at all events to be regarded as a mere formal unity. But the substantial unity of consciousness is the truth as to consciousness, on which there is special need to lay stress.

The individual—you, I, or another—can in no case be construed or explained as a self by the method of introspection. In supplement and correction of the results obtained by turning attention back on one's states of consciousness, psychology has to adopt other methods. Thus, in order to eliminate elements which are accidents of the individual, rather than essential qualities of the individual, psychology is constrained to make a large use of the comparative method. With a view still further to supplement the particulars which are derived from introspection, as well as better to interpret them, psychology must rely especially on what is called the objective method. The objective method is that one which involves an examination of the substantial and enduring products of the human mind: those products, for example, which are preserved in language, in science, in social and political institutions, in art, and in religion.

Both the comparative method and the objective method, as they are applied to the subject-matter of psychology, go to establish, what indeed they are bound to presuppose,—the essential identity, namely, of all individual minds, be the differences between mind and mind what they may. The identity which is discoverable by direct observation and comparison in minds that co-exist, is proved, from the monuments of human achievement in the past, to be true also of minds which are prior and minds which are subsequent to each other in point of time. Anyone reading, for instance, the dialogues of Plato and the treatises of

Aristotle, thinks the thoughts of Plato and Aristotle. Five and twenty centuries lie between. Differences not to be measured may mark off the minds of those masters of all time from his mind. Nevertheless, as far as he is able to think their thoughts, so far is his mind identical with theirs. Mind as mind transcends all individual minds, as the infinite transcends the finite. But the infinite shines through the finite, and the universal reason mirrors itself in the minds of men.

It is more especially in the aspect of *will* that mind and minds are regarded by jurisprudence. Thought or reason translating itself into act or deed—this may serve as a preliminary explanation of what is meant by will. The universal will has for its product in the actual world, or the world of actual fact, the whole social and political system of the present, as that system has been derived from all those movements and events and institutions of the past, which come, as relating to human effort and achievement, within the scope of history.

The universal will, as manifesting itself under the conditions of space and time, is the human will. The human will, as manifesting itself throughout the world, and from age to age, in the establishment of social and political order, is the will of the mass of mankind. The human will, as manifesting itself so within this or that definite territory, is the will of such or such a people.

## CHAPTER II

### WILL

WILL being in its essence an activity, that activity, it is evident, must be determined to its issue or outcome either from without the will itself or from within. In the former case—that is to say, if the activity be determined by an external cause—then the will is under a constraint which precludes all notion of its being free. On the other hand, if the activity be determined from within the will itself, by the mere force inherent in will, then, quite intelligibly to the least disciplined understanding, the will is free.

The will of any individual, as exercised on any particular occasion, may be governed so completely by some external influence as to leave no room for maintaining that, on the occasion in question, the will of the individual in question is a free will. In the meantime, however, the human will, as such, in its very nature or essence, and not the will of any individual, is under consideration.

Will is one aspect of self-conscious being, and self-consciousness involves the identity as well as the difference of subject and object, of self and not-self. The object which corresponds to self-conscious being as such, and therefore to will as such, is the outward universe in the totality of its outward existence. But the object, while it is abstractly opposed to the subject, is at the same time one with it, in virtue of the objects being the

embodiment of thought, though the thought there is not conscious of itself. The activity of self-conscious being, then, is determined by an object which is identical in nature with the thinking subject itself. But whatever is determined only by its own nature is free, in the meaning of freedom to be presently explained. Freedom, then, is the essence of will; for freedom is the essence of self-conscious being, and will is just a mode of self-conscious being.

The notion of freedom is often taken to be simply the negative of the notion of necessity. This antithesis or contrast is presupposed in the theological disputation about man's will. It is also the assumption on which the argument of physical science proceeds in denial of free will, as that argument is set forth, for example, and most notably perhaps, by Dr Tyndall.[1] Throughout these controversies the notion of necessity is held to import mere fatal causation. Fatal causation, or, in other words, determination from without, and only from without, may be readily illustrated from the subject-matter of dynamics. The impact of one body on another sets the latter body in motion, and determines the direction of its motion. The production of these results is of necessity. But the necessity is a purely external necessity, as the relation of the two bodies to each other is a purely external relation. The body which receives the impact is determined rigorously from without, by the body which gives the impact. Outward necessity, as thus described, is manifested everywhere and with unbroken uniformity in the causality of nature. But self-conscious being, since it involves the identity as well as the difference of subject and object, cannot be determined from without. That which is abstractly without, comes, in self-conscious-

[1] *Fragments of Science*, vol. ii. pp. 337–374.

ness, to be really within. Further, self-conscious being must be determined in its activity by some necessity; for, were it not so determined, it would have no unity, no coherence, and, in short, would not exist. Self-conscious existence, face to face with only that which is contingent, is an absolute contradiction of reason. There is, then, a necessity of some kind, which is manifested in the activity of self-conscious being—that is to say, in will. The necessity which determines will is an inward necessity. It is a necessity which belongs to the very nature of will itself. Will, of course, must have an object and must be determined by that object. But because will is just a mode of self-conscious being, and because self-consciousness involves the identity as well as the difference of self and not-self, the object of will is in truth the same as will itself. In other words, will has itself for object. Now, when the self or subject is determined by a not-self or object which is not external to the self, though standing out against the self as different from it, this is self-determination, or determination of the self by itself. A being that is self-determined and only self-determined is a being that is free. Self-determination is the truth of freedom. Will, then, is free, not in the sense of its being able to break through or overcome necessity, but in the sense of its being determined by a necessity of its own nature—that is to say, by an inward necessity.

The human will, the immediate concern of jurisprudence, must, in so far as it is will, be will in the sense here described. But the human will is not pure will, or will showing itself purely as will. There are two sides to man's nature, and the physical side has to be taken into account along with the other. Man, then, and more especially man in the particular, a man, any man, thus presents the difficulty

which Dr Tyndall has expressed in these words: "If our organisms with all their tendencies and capacities are given to us without our being consulted, and if while capable of acting within certain limits in accordance with our wishes, we are not masters of the circumstances in which motives and wishes originate; if, finally, our motives and wishes determine our actions,—in what sense can these actions be said to be the result of free will?"

Men, it is undeniable, are actuated to a large extent by natural promptings. Whether, as so actuated, they are driven directly by the natural impulse, without power on their part to resist the force of it, or are influenced by the impulse only through some medium which enables them to control and even to withstand the pressure—this is the question with regard to the will as related to motives originating from without. If men can turn natural impulses—instincts, as they are usually called—into motives of calculated effect, then the difficulty about the freedom of the individual will is no longer in the way. For motives of calculated effect, whatever be their origin, are motives of reason. A will that has motives of reason is a free will, because the motives are of the same nature as the will itself; and determination by them is self-determination.

In its earliest and crudest manifestations the human will hardly betokens any connection with thought. It is for the satisfying of the animal part of his nature that man first exerts will. Even in this case the reason which is implicit or undeveloped in him begins to come out. When a desire springs up, there is of course an object of desire, something outside, which attracts the mind. He who is conscious of the desire consciously sets the desire in relation to the object which has called it forth. An act of judgment is required, in order to settle how the object of desire is to be laid hold of. Further, desire often refers to

several objects at the same time, when the gaining of one of the objects may mean the losing of the others. The several objects then require to be compared with one another. By-and-by, the various wants of which men are conscious come to be reduced into a system, or, as you may phrase it, into a rational order, more or less simple, more or less elaborate. In the experience of the individual man this system is determined by the greater or less importance of his wants relatively to his conception of well-being. His conception of well-being or of what well-being consists in, is that which his capacity, as affected by his surroundings, has enabled him to form. The system thus produced is made as a whole the object of his pursuit under the name of happiness. But happiness may mean for one man something very different from what it means for another man. Besides, it may mean for either of them something very different at one time from what it means at another time. Each has his own needs and his own objects of desire, and these in his own retrospect of life are not always the same. Happiness is intrinsically or vitally connected with those needs and with those objects of desire. Happiness, therefore, is in its very nature something that is particular. It is something that is contingent or accidental. It is in ultimate analysis a state of feeling, an emotion, a sensation. It is the pleasure, namely, which results from fulfilled desire. But the human will, because it is a rational will—because, in a word, it is reason—must have for its supreme object something that is universal and necessary. It must, therefore, have for its object something else than happiness. The only thing that is universal and necessary is reason itself. The true object, then, of man's will must be reason or the will itself

When the motives which originate from without are

reacted on the mind, when they are brought into a system, and when they are embodied in ethical institutions, obedience to motives is then no longer submission to outward constraint. It is only when the motives from which one acts are external to the self, and remain external, that one's will has not itself for its object, and is therefore not free. As long as I am subject to a law which has neither originated in my will nor received the sanction of my will on the ground that the law is, in fact, a dictate of reason, so long I am in bondage to the law. This holds in respect of a physical law as well as in respect of a moral law. But once the law is recognized by me as an outcome or reflection of my own thought and will, once it is recognized by me as an expression of my own self, then the necessity which belongs to the law ceases to be any longer outward necessity. Though the law be, on the face of it, imposed on me from without, the necessity which it carries with it is thenceforward for me an inward necessity. Obedience to such necessity is simply obedience to what is highest in myself.

Thus, man is the slave of nature, so long as he remains ignorant of its laws. But in acquiring knowledge of those laws he conquers nature. Physical science is neither more nor less than reason's discovery of reason in the outward world. Man, then, when he finds reason or himself in what at first sight seems utterly external to him, learns that in conforming to the law of nature he is simply obeying his own law, the law of reason. In this consciousness lies the substantial fact of freedom.

It is the same in regard to the moral world or the state. So long as the individual fails to see his own will realized and made manifest in the institutions, legal, moral, and political, under which he lives, he is in bondage to those institutions. But no sooner does he recognize them

as the embodiment of his own spirit, no sooner does he see in them the expression of his own thought and will, than the pressure of outward constraint is taken off. The incubus of coercion is removed. In the consciousness that his own true self is realized in those institutions he is free. This consciousness he attains when he perceives their reason and its sufficiency. He, the individual, then wills that which is expressed in the laws to which he is subject.

## CHAPTER III

### SPIRIT

THE words 'spirit' and 'spiritual' dissociated from reference to any special dogma or system of theology, may be used in jurisprudence to cover all the attributes of self-conscious being. Thus qualified, the terms are appropriate to denote the vital energy of mind which manifests itself in the growth of society, in the state, in religion, in art, in law.

Spirit can be considered as apart from any manifestation or embodiment of it. But spirit does not so exist. Will, not yet put forth, is abstract. How, then, does that which is abstract become that which is actual? How does that which is mere inner pass into that which is outer? How, in brief, does spirit realize itself?

Realization, by the very import of the notion, is bound to be in and through something which, as first thought of, is external or foreign to that which is to be realized. Only where the potencies which seek to be realized are exhaustible can the process ever be complete. Spirit, then, being of infinite potency, undergoes in the world of human experience a never-ending process of realization. The human spirit, in order to be at all, has to be active, and, in order to be satisfied, has to go on realizing itself. Man being subject to the conditions of time and space, his self-conscious life is an unceasing struggle to conquer his sur-

roundings and to rise above his past. The history of the world is the record of the evolution of the human spirit. The record is marked by great epochs and by frequent retrogressions. The process, nevertheless, results on the whole in the more and more complete triumph of mind over the material universe, and in the shaping of social and political institutions into even more perfect forms.

The notion of evolution implies the presence throughout the process of the two antagonistic elements of difference and identity. In the growth of a natural organism—a tree, for example, or an animal—the organism is, from the first stage of its existence to the last, the same organism ; and yet at every stage of its existence it is different from what it was before. If it were not the same throughout, and if it were not also different, the tree or the animal could not be said to grow.

Self-conscious being, spirit, involves both of the elements, identity and difference, which enter into the notion of evolution. There is therefore an evolution of spirit. But there is a difference between evolution in the case of self-conscious being and evolution in the case of a natural organism. The development of the human spirit as seen in history is indeed analogous to the phenomenon of development in the physical world, but it has a character of its own. For one thing, and more especially by way of contrast, there is a constant tendency on the part of spirit in the process of realizing itself to break out into conflict with itself. The development, on the other hand, of an organized natural object is direct, regular, undisturbed by any inherent tendency on the part of the organism to break out into conflict with itself.

Take, for instance, as the type of all natural development, the growth of an acorn into an oak. Virtually or potentially the acorn is the oak; in other words, the acorn contains

within itself the whole of the elements which are afterwards found embodied in a specific form in the oak. It contains these elements in such a fixed relation to one another as determines beforehand what the outcome must be. The oak, then, is the acorn realized or come to be fully explicit: there is a transition from acorn to oak. The transition involves a process in time which is measureable as to its duration and which is certain as to its result. But the transition is not mediated or brought about by any conscious adaptation of means to end.

Apart, then, from some outward contingency such as blight or thunderstroke, the development which takes place in nature is to an inevitable issue. The natural organism unfolds and expands, not under subjection, in any primary sense at least, to foreign influences, not, in any primary sense, under compulsion from without. It unfolds and expands by force of an inward principle of its own. This inward principle is fitly called the principle of life, inasmuch as the failure of the principle means death to the organism, from whatever cause the failure may arise. In the course of the natural development a differentiation into parts takes place. These parts get implicated with what is external or extraneous. In this way they get modified through their surroundings and connections. But, all the same, the process comes in the end to what is precisely the opposite of substantial change. The process, indeed, insures the preservation, not only of the organic principle as such, but also of the actual type in which that principle is involved.

The development of the human spirit, as manifested in the world's history, reveals no such even, unobstructed movement from germ to fruit and from fruit to germ as shows itself in the changes which take place in nature. In spite of all their variety these changes come always round to the point of origin. In other words, they work out only

an endless reproduction of what has been from of old. The historical development of the human spirit is a process of another kind. It is a process of unceasing strife. The striving or struggle is, in the main, a strife of the spirit against itself. It is always towards an object which has never before been fully realized.

The evolution of which history is the record, is not an uninterrupted progress, if by that be meant anything like the tranquil and undeviating flow of a river to the sea. Rather is it a progress on the whole; with stoppage or with backward movement, now here, now there. This or that age, this or that people, brings to actual outcome, or, in a word, realizes some of the possibilities which lie wrapped up in the spiritual or self-conscious nature of man. Of course only some out of infinite possibilities are ever thus realized. Consequently the expression of the ideal by the age or by the people is narrow and inadequate. Perhaps for long it may not be ostensibly so. Ostensibly, indeed, it may in the meantime be perfect. But as Browning somewhere puts it, "What is perfect perishes." The very claim, therefore, to permanence of any form of truth, or of any institution on the ground that such form or institution is of final validity, tends from the first to the breaking down of the form or of the institution. Sooner or later the claim to permanence brings about its own contradiction. Other possibilities, other energies of the same spiritual nature, assert themselves.

The contradictory forms in which these forces find embodiment, prove, in their turn, to be just as narrow and inadequate as were the previous forms or institutions. There follows, then, an effort to overcome the contradiction. Both of the forms which are involved in the contradiction are merged as elements in a new ideal. This new ideal,

in its turn, comes by degrees to be realized. But again the finitude of the actual result contrasts with the infinitude of spirit. Again the process of contradiction and of solving the contradiction has to be gone through.

Never otherwise than gradually, or bit by bit, does man come to know himself or to realize his freedom. All experience bears witness to this fact. Far back in the past, man, in such glimpses as we get of him across the ages, hardly stands out clear as against nature. The spiritual side of him has but feebly asserted itself against the other side. Instinct, therefore, rather than thought, or deliberate purpose, goes to the first formation of those mutual relations of life in which society takes its origin. But the human instincts have their root in a spiritual or rational nature. Further, mind or reason, although for the most part implicit or undeveloped, is, nevertheless, from the first, there. Hence the earliest relations between man and man are determined, not by accident and not by caprice, but by some dim apprehension of an end or aim. What that end truly is, remains for the thinkers of a long subsequent time to discover and explain.

But even the vague aspirations which govern the primeval adjustments of human relations—even those vague aspirations indicate the awakening of thought and the birth of will. Man has begun to know himself. While seemingly engrossed with the immediate object of desire, with the satisfaction of some material need, he is already on the way to work out his emancipation from the fetters of nature. The latent energies of his spiritual nature begin to make themselves manifest. Through contact with his kind he enters on the first stage of that self-realization towards which his destiny is seen to point. Local and temporary checks are necessary elements in human progress. In spite of these, the achieving of

freedom has been from age to age, and throughout the world, the master interest of human life and the supreme object of human effort. Religion, law, politics, science, art, have all of them the same ultimate task. That task is to liberate the spirit from its servitude to sense. In other words, it is to make men free.

## CHAPTER IV

### FREEDOM

VIEWED in their continuity, and viewed in their widest scope, the facts of history support the assertion that the idea of freedom has developed from smallness to greatness and towards fulness. The movement of mankind has, on the whole, been an onward movement. The initial point of civilization is represented by the civilizations of the East. At this point, freedom is conceived of as the attribute or the possession of one man alone. All other men are considered to be the mere instruments of that one man's will. But the will of the despot, though it is commonly spoken of as free, is not really free. It is determined by circumstances, by the temptations of sense, by the impulses which emanate from natural bias. In a word, the will of the despot is caprice. Arbitrary and contingent—that is the character of caprice. The essence of freedom, even in the case of the individual, lies in his action being determined by inward necessity, as distinguished from the necessity of what originates outside of himself, and remains external to himself. Caprice and freedom are thus opposites. Further on in the evolution of the idea of freedom is the stage which was reached by the mind of ancient Greece. At this stage some men, the few, are thought of as free, and other men, the many, are thought of as not free. Those who are deemed to be

not free are treated accordingly. So most of the inhabitants of the territory famous as the seat of the Greek states, are, in ancient times, in the condition of slaves who count for no more than instruments of the will of their owners.

The transition from the second to the third and latest stage in the evolution of the idea of freedom, is historically due to the influence of the Christian religion on the races of Western Europe, and especially on the Germanic race. Under this influence, and most of all as it has affected the Anglo-Saxon mind, the modern ideal of freedom has come to be that all men are free. They are held to be free in virtue merely of their manhood, in virtue merely of their rational or self-conscious being. Once and for all, this is the ideal to which all further progress must tend, however long the ages to which that progress may have to run.

Freedom, we are now to see, is the ground of right. But we cannot establish the proposition till we have, in some measure at least, examined the notion of right.

Kant pronounces the question, What is right? to be as hard for the lawyer or the moralist to answer, as Pilate's question, What is truth? is for the logician. Hard or not, both of the questions must be faced. Both, it may turn out, are to be answered in the same way.

Right is apt to be regarded first from the point of view of the individual. What I think right is for me right; what you think right is right for you. But each of us takes for granted at the same time that what we hold to be right is right, not only for ourselves, but for others as well. Nay, we deem it to be right for all others, if only they be as competent as we to judge in the matter. Further, we assert our position to be right, not because it is our position, but because it is believed by us to be determined

as right independently of our own or any other particular will. In short, even according to ordinary thinking, right is objective or necessary. It is valid for you, and for me, and for every one who shares in the nature of reason. It is not merely subjective, as it would be were it valid only for you, or only for me, or only for so many others.

Thought and will are at bottom one and the same. Will is thought passing into act. It is thought going out into some object, so as to grasp or master that object by bringing it into relation with the being who thinks or wills. Because thought and will are thus identical, the ultimate criterion or test of truth and the ultimate criterion or test of right are one and the same. Whatever is necessary is, in the sphere of thought or theoretical reason, truth. Whatever is necessary is, in the sphere of will or practical reason, right.

This conclusion, as regards right, that whatever is necessary is right, must be carefully distinguished from the dogma of optimism, as laid down by Pope, that "Whatever is, is right." No doubt, whatever is, in order to its being at all, must have expressed necessity. Further, as long as it still is, it has in its favour the presumption of right which arises from the fact of its continued existence. But the necessity which it once expressed, it expressed relatively to circumstances which may have changed. The same necessity may now, in the process of its evolution, demand some new form, some different embodiment. This means, of course, that what is to be right contradicts by so much the right of what is. But the principle of right does not change with the forms of right.

Only that, then, is right which expresses necessity. An act is judged and declared to be right or not right, according as it indicates a will conformable to a standard of presupposed necessity, or a will at variance with that

standard. The necessity which is presupposed as the standard of right is the inward necessity of will or reason. All human action has reference, of course, to outward circumstances. But the moral character of human action, and more specifically its legal character, its being right or its being not right, depends entirely on its being affirmative or negative of that which reason demands to be done in the circumstances. How this demand of reason is discovered by the individual, how it is bodied forth in what transcends the individual while it includes him,—these are questions to be presently discussed. The point to be first grasped is this, that what makes the act of the individual right can only be a harmony between the individual reason as expressed in the act, and the objective or universal standard of reason. The harmony is possible, because the inward necessity of the individual reason is identical in its issue or outcome with the necessity which is expressed in the objective standard. Discord is possible, because the act of the individual may in a particular case not be determined by reason. When the harmony which makes an act right does in fact exist, you have the will of the individual governed by its own inward necessity. But any will that is so governed is a self-determined will, and, as we have seen, self-determination or autonomy is the very notion or meaning of freedom. Consequently, as human action is right only when and in so far as it expresses the inward necessity of reason, and as that condition—the condition, namely, of being ruled by reason —is the condition of freedom, it is plain that freedom is the ground of right.

The existence of an objective standard of right has so far been assumed. It has now to be demonstrated. Where, then, is this objective standard of right to be sought for? It must be sought for where the will of the

individual exists in actual relation to it. The objective standard of right must therefore exist under the conditions of time and space. It must, too, be the expression of a will which transcends all individual wills. They are to be measured or estimated with reference to it. They are to be regarded as right or not right, according as they coincide with it or diverge from it. Where individual wills actually co-exist with one will that is thus superior to them all, *there* must be the sphere of right. It is only in the state that the positive or concrete correlation of the particular will with the universal is realized. The state, then, is the sphere of right.

# CHAPTER V

## THE STATE

I. THE FAMILY. II. THE VILLAGE COMMUNITY. III. THE CLAN. IV. THE NATION. V. THE STATE.

ACCORDING to the definition proposed by Mr Sidgwick, a state is a body of human beings living in a certain degree of civilized order, and united by obedience to a common government which exercises supreme dominion over a certain territory.[1] This definition quite accurately represents a state, as viewed on what may be called the material side. Every state has a physical existence, and therefore an external aspect. There is that, however, in the nature of the political union which lies beneath the surface. Of course what is ostensible, or on the surface, reflects the inward truth, but never so as to let it be fully seen. Mr Sidgwick has brought into his definition of the state only what is ostensible. Still, the definition does not need to be recast, in order to be made complete. What it omits may be simply added: that the state, as viewed on its ideal side, or in its essential meaning, is the rational unity of all the relations of human existence which have developed out of the consciousness of men.

The idea of the state is implicit in the co-existence of men, from the initial point of time to which such co-existence can be referred. Even then the first steps in

[1] *Elements of Politics.*

the process of civilization are, for thought, neither prior to nor apart from the state. But for understanding, an order of time has to be supposed and the state spoken of, as to its origin, as if there actually were antecedent conditions. Thus men have to be figured as standing to one another in certain relations of fact, before the state comes into recognized being. Those relations are the direct result of the co-existence of men in space, and of the commerce or intercourse, however occasional and elementary, of man with man. When circumstances are the same or similar in the experience of different men, relations the same or similar between the different men are, for the time, inevitably produced. The relations in question emerge at first as purely natural combinations or adjustments, and as matter of purely individual experience. But soon, as recurring in the experience of different men, they show themselves conformable to certain types. They come to be apprehended as normal. The moment 'normal' is said, reason is implied. Men are beginning to be conscious of themselves, and are learning to see their own nature reflected in the customs which mould their lives. When the relations among men have taken more or less definite or settled forms, so as to exhibit typical resemblances and differences, they pass by an easy transition into recognition as institutions of right. Thenceforward they furnish the rule for all cases falling under the particular type. This rule is maintained, and on occasion enforced, through the existence of the state.

Many relations of a permanent kind have developed out of the rational nature of man, and more specifically out of the free energy of his will. Property, marriage, succession, or inheritance are instances, though they have developed under varying conditions, and so may have come to differ widely in respect of their peculiar features; they are nevertheless homogeneous, because of their all having the one

root. Further, and because of their being homogeneous, they are all so connected intrinsically as to be a system or complex whole, capable of scientific explanation. This system or complex whole is the state.

The definition of the state, as the rational unity of all the relations of human existence which have developed out of the consciousness of men, involves not only that the state is a necessary union, but also that the state is an organism, a whole made up of parts which subsist only in and through their connection with one another and with the whole. This latter proposition finds its demonstration in all that remains to be said in the following chapters. Here it is sufficient to make clear what precisely is meant by the state being organic. The state does not exist apart from the individuals who are members of it, any more than one's body exists apart from the members of one's body. The state is more than its members taken together, just as one's body is more than the sum total of its members. In both cases the very existence of the members as such depends on a principle of vital connection, which is briefly expressed in the one word organization. Organization implies inter-dependence and subordination of parts. It implies also difference of function.

As regards the proposition that the state is a necessary union, not a voluntary one, it is of consequence to emphasize the fact at this point. The will of the people is the basis of the state. But that will is not an arbitrary will. It is a will governed by the necessity of its own nature. Its outcome, then, in the state bears the same character of necessity. In the fact of the state being a necessary union lies the radical difference between the political union on the one hand, and municipal or any other special association on the other hand. One enters into the state because one must. One enters into a society

of any kind because one will. Certain ends are served by association, not otherwise to be equally well attained. But these ends are, none of them, conditions of existence. The state is an end in itself.

Reflection removes any semblance of paradox from the conclusion that the object of the state is the state itself. Because freedom is the essence of spirit or self-conscious being, the absolute final aim is freedom. Law, morality, government, are the actual or concrete truth of freedom. They exist only in and through the state. Thus the state, as expressing the absolute final aim, is an end in itself. It exists for itself, and not as means or instrument to any other end. In other words, the object of the state is the state itself.

But the process of emancipation which the spirit of man —and, in more definite meaning, the spirit of the people— has to undergo, in and through the state, is a process which affects the spirit in all its aspects, and not merely in the one aspect of will. Knowledge, feeling, and will are various phases of one and the same substance or truth —the truth of self-consciousness. The state, as expressing the absolute, final aim, which is freedom, exists for the more and more perfect achievement of its own ideal in the evolution of freedom. The state, therefore, involves the realization of will in a system of positive right. But it involves more. It involves the culture of all else, be it of knowledge or of feeling, that has its root in the spirit of the people. Thus, in the object of the state are comprehended all the great spiritual interests which we name religion, philosophy, science, art, industrial effort, commerce, and so forth. These, it is true, are not so directly or immediately the concern of the state as right is. They are not in general so immediately the concern of the state as to require, or

even to justify, the intervention of public authority, or the exercise of government functions, in the way that is appropriate when right is in question. But, all the same, they are really included in the object of the state. The establishment of right, the maintenance of right, and the development of right, are conditions precedent of every other pursuit that does or can worthily engage the activity of men. On the other hand, all the specific interests of the human spirit have for their effect the furtherance of the final aim which is bodied forth in the state. As religion, science, art, and the rest come gradually to be realized, each in its own way and each in its own sphere, they all tend and contribute to the same result. That result is the complete unfolding of the spirit of the people, the full attainment of freedom.

The institutions of right, the laws, the traditions, the usages, which constitute the order of the state, may be viewed as instrumental to the realizing of such specific interests of man's life as seem far removed from politics and jurisprudence. But there is a reciprocal influence on the development of right. Thus, then, the whole network or texture of the activities of the human spirit is involved in the object of the state.

I. THE FAMILY.—Experience, so far as it bears on the subject, supports the inference that no sooner do men live together than they form natural groups. The first and smallest of these groups is the family. In the family, considered as a natural group of human beings, the mere physical differences amongst the members produce a constitution of the group under which one of the members takes the position of chief or head, and the rest all take subordinate positions. When the family enters the sphere of right, the naturally determined relations of its members to one another receive the sanction of law. This sanction,

however, is always subject to the condition that, in so far as what has been naturally determined may not have been determined as of absolute necessity, and therefore as for all time, those relations are liable to be modified and anew adjusted as the idea of right develops. Thus it has come to pass that, while in the ancient family the members had no status of their own, but had rights and duties only in and through the family, nowadays the tendency is more and more towards recognition of the members of the family as, each of them, *sui juris*; allowance being made, of course, for those qualities and accidents of the individual—such as age and mental condition—which in the very nature of the case are bound to affect status.

But the existence of several families, side by side with one another within a limited area, soon, not to say at once, gives rise to the discovery of occasions for comings and goings among members of the different family groups. By an instinctive impulse towards aggregation, members of one family group are drawn into *de facto* relations of various kinds with members of other family groups. Contiguous groups tend thus to become aggregated, or, so to say, associated, more especially as against inroads or invasions on the part of similar combinations which have been formed at a distance. On the ground of historical research it seems safe to regard a nomadic condition of human existence as the earliest of all. This nomad condition is marked, now by seizure, now by abandonment of particular tracts of land, or of particular sites, according as the impulse may prompt, of a roving band of people in quest of subsistence at the least expense of industry. By-and-by, driven by whatever stress of circumstances to come closer together, and to keep closer together, people grouped themselves together in this small district or in that, and formed what is known as the village community.

II. THE VILLAGE COMMUNITY. — From all the memorials which have come down, the primitive people seem to have been thus driven to combine, not only for defence in an epoch of constantly recurring strife, but also for cultivation of the soil to support their growing numbers. In respect of the land which was occupied and in some sort cultivated, the group of people thus constituted out of so many families, was a true community. Individual ownership was not recognized and did not exist. In process of time, and as a natural result of advancing social needs, an apportionment came about of dwellings. Afterwards, and relatively to those who dwelt together under one roof, an apportionment came about of the fields adjacent to their dwelling. Periodical redistribution served to keep alive the tradition of community. Notwithstanding the fact of private possession in respect of houses and the fields lying next them, this periodical redistribution served to exclude the idea of private ownership, even in respect of those houses and fields. Besides, so much of the land as was not thus apportioned continued common, even as to possession. Each family within the community was required to cultivate some portion of it for the benefit of the community. Even were it capable of proof that in the remote past there was actually a time when human beings lived in no community of any kind with one another, and even were it made out as a fact that during that period, instead of a war of all against all, peace based on a strict regard for the distinction between mine and thine, was on the whole the outcome of each man's following his own inclination and doing what seemed in his own eyes good, the absolute unrestraint of the particular will thus shown to have existed would preclude the presence of right. And why? Because right implies the exercise of the particular will in accordance with a standard of

universal validity, and such a standard presupposes a universal will which is realized only in and through the state. By hypothesis, however, the state does not yet exist, the will of the people who are massed within such or such a territory is not yet unified, the foundation of a juridical order is not yet laid.

III. THE CLAN.—The third stage in the historical evolution shows the practically inorganic mass of the village community wrought out into organic union of the clan. The bond of relation in the clan was the tradition of common descent. The principle of cohesion among the members was fidelity to the chieftain or chief. To the clan as such, in distinction from the members of it as individuals, or any of them, the land belonged. In this, as in other respects, the head of the clan was only its foremost representative.

The original impulse of men towards aggregation has been spoken of as instinctive. But reason is implicit in the human instincts, and there is a consequent tendency on the part of primitive groups to assume settled and typical forms. Every natural group of human beings is something more than a numerical aggregate. It is more than a mere physical union, because the constituents of it are, potentially at least, free agents. The relations, then, among the constituents of any such group, as well as between the constituents of one group and those of another, are no haphazard relations. They are determined primarily by the rational quality of human nature, and only secondarily by external circumstances. External circumstances, it is true, present themselves as foremost in the order of time. But the external is always contingent. In its effect, therefore, on the shaping of domestic and social relations, the force of circumstances is subordinate to the force of necessity which is involved in will. Thus

each group in the series, from the lowest upwards, subsists under two aspects, so to say. On the one hand, it subsists as a natural union—a union, that is, of men, women and children regarded simply as men, women and children. On the other hand, and at the same time, it subsists as a centre or ganglion of relations which have been developed out of the consciousness of men.

In each of these relations the human beings of generation after generation act, on the whole, much as their predecessors have done. Practical uniformity of conduct on the part of successive participants in the same rational nature is inevitable, when, as between earlier and later times, the conditions of life are practically uniform. The inherent tendency of men to do that which, in the same circumstances, has been done before, by themselves and by others, is of course strengthened by observation and recollection and tradition of what has so been done. This is sufficient to explain the origin of what we call use and wont. The past runs into the present and carries with it the accumulated weight of its own results, because the men of to-day are essentially one with the men of long ago. Common use and wont, then, as thus originating, is the earliest bond of rational connection within and among the ascending series of groups which has already been so far discussed.

In doing what contributes to the forming of custom, or use and wont, the members of those groups are, no doubt, more or less obedient to ordinary motives from without. But the rational element implied in human nature, even at its lowest, qualifies the manifold products of human activity which gradually solidify into consuetude.

IV. THE NATION.—In the same way as the village community, and at a later stage of historical progress, the clan are formed, the people or the nation is formed. In

the ascending series of natural groups, the people is the largest and highest group. What constitutes the people a nation is a community of sentiment due to the tradition of a common descent, or to some other such cause.

V. THE STATE.—The people, as being the highest group, and as comprehending all the lower groups, sums up in itself all the relations of human existence which have, in and through the various groups, developed out of the consciousness of men. When these relations are viewed in their mutual connection and in their totality, when, in short, they are viewed as a system, then the notion of the state is reached. By the definition already given the state is the rational unity of all the relations of human existence which have developed out of the consciousness of men. The state, then, corresponds to the notion of the people as a whole. But the state is by no means to be taken as just another name for the natural union of the people, though the state exists only on the basis of that natural union and in inseparable connection with it.

The will of the people is the genetic principle of the state. But the unity of will thus implied demands explanation. In spite of the substratum of identity, as to nature, among the human beings who make up the mass of the people, the differences are innumerable and persistent. These differences have for natural result a diversity of wills on a par with the plurality of wills. What, then, is the process through which a unification of the different wills is brought about? The will of the people, as realized in the state, is not what may be called the general will. That is to say, the will of the people is not a collective unit. It is not a mere numerical unit, made up of so many particular wills which happen to be concurrent or coincident, but which, because of their being diverse and particular, might happen not to be concurrent or coincident. On the contrary, the

will of the people as realized in the state, is an intrinsic unity—a unity of principle. It is incapable of being construed out of particular wills by any process of arithmetic. The unified will of the people is an organized will. The unity depends on organization. The particular will of the individual human being is contingent. It is contingent because it is mixed up with other elements of his nature than those which are, in the narrow sense of the word, rational. It is mixed up, for example, with modes of feeling; and so the act which results may not be a true result of the inward necessity of will. This holds with reference to every particular will. But when men are organized in the state, and even as a people in transition to the state, the particular elements of their various wills become eliminated in the process of organization, and the will of the organized body is purely objective. It stands out as universal or necessary in contrast to the will of any and every member of the body as particular or contingent.

There is a certain amount of truth in the proposition, *ubi societas ibi jus*; even when society is hypothetically deemed to be pre-existent in reference to the state. The truth may be otherwise, and perhaps more definitely expressed in this way: the consciousness of right is presupposed in the existence of the state. But since the state is the sphere of right, since it is only in and through the state that right becomes actual or real, the consciousness of right must be prior also to the existence of positive right.

Right and the state have, both of them, the same natural source. That natural source is the will of the people. Neither right nor the state is to be thought of as derivative the one from the other. Least of all is right to be thought of as derivative from the existence of the state. Under the influence in the main of Bentham and Austin, most lawyers

and most politicians, not only in England but also in this country, set out from the position that right does originate in the state. In the ordinary view positive right or law is the command of a legislator. The existence of the legislator presupposes of necessity the existence of the state. But a deeper insight into the truth of the matter may be justly claimed by those who maintain that the consciousness of right is prior to the existence of the state and prior also to the existence of positive right or law.

"The spirit of the people," says Puchta, "as the national spirit, brings forth the state in the same way as it evolves right. It does this by uniting the members of the people in the will to subject themselves to its authority as the organ of right." It is capable as an organized will of undergoing changes of form. It is capable also, in whatever form it assumes, of being opposed by this or that particular will. It is capable, on occasion, of prevailing against even a majority of particular wills.

Unlike the family, but more like the intermediate groups, the people has no natural head. The first step, therefore, towards that organization of the people, through which their wills become unified, is taken when some one man, by reason of superior physical strength or of pre-eminent ability, raises himself to the chieftainship of the people, or is chosen by them as their leader. Chieftainship, leadership, headship, name it as one will, expresses, however crudely, the notion of government. The government of a people implies a relation of subjection on the part of the people individually and as a whole to a central and sovereign authority. This sovereign authority exercises a will of its own which yet in theory if not always in fact is the rational will of the community itself. It is the existence of this relation which transforms the natural union of

the people into the state. Whatever be the form which the government may take, the actual or concrete sovereign authority is the organ in and through which the will of the people finds embodiment for itself, and so becomes unified, or blends all the individual wills into one coherent will. The will of the people is never completely coherent till it is unified in the state, and embodied in the institutions of right. By degrees, as the consciousness of common interests and a common nature grows among the units of the mass, the natural union of the people assumes the character of a social order. *Ubi societas ibi jus.* But if society, at any stage of its historical development, prior to the existence of the state, involves right, as this maxim asserts, right must be understood as then inchoate, potential, not yet recognized as right. Such an objective or universal will, as we have seen to be implied in the notion of right, a will which can claim to be universally valid, is to be found only in the state. Proportionately, of course, to the growth of the spirit of the people, particular wills have to be thought of as tending to knit themselves into identity with other particular wills, until sufficient coherence of will is realized to support the idea of the state. Each unit of the mass being potentially a free-will agent, each is under a constant impulse to realize his will as free. Each, in other words, tends to act in the line of the spiritual force which is latent in his nature. That line cannot be otherwise figured than as a straight line, and a straight line is the symbol of rectitude or right. Right, in the most abstract definition of it, is that which is determined by the intrinsic necessity of will. The combined effort or activity, therefore, of all who collectively make up the people, tends to bring about a condition of fact which shall substantiate or give outward expression to right. When at length in and through the state the will of the people is wrought

together into one, then it transcends all particular wills. Then it represents the inward necessity which is implicit in every particular will. Then it stands out as the universal will, as the true expression for the time of the principle of reason. Then it makes manifest the objective standard of right. The unifying of the will of the people in the state does not involve the annihilating of particular wills. In the state the universal and the particular may be said to confront each other. But they do not exist apart. They are not independent of each other. The universal, in truth, particularizes itself, or specifies itself. *The antithesis of the universal and the particular is solved in the individual.*

The state has to be, in order to ground the distinction between the universal will and the particular will. But although this is so, the distinction enters, in its turn, constitutively into the idea of the state.

As regards right the distinction is crucial and real. At the same time it is essential to bear in mind that, whether the universal or the particular be spoken of, it is still always the human will that is in question. Given any number of human beings; then, because the will of each is potentially a free will, their several wills, were they in every case actually free, would be identical with one another in issue or effect. They would be so from the inward necessity implied in freedom. In other words, apart from subjection to motives which originate outside of the will itself, and remain external or unassimilated, the will of every individual would always go right, or would always be exercised in accordance with the objective standard of right. Thus, in respect of any matter which might call forth the activity of both, the will of A, for example, would never differ from that of B; for, by hypothesis, both would be free, in the sense of their being

purely self-determined; and the self of A would, as pure self, be the same as the pure self of B.

If, in the case here imagined, the name of right be given to the concordant outcome of the several wills, right, as objective, must be thought of as the expression, in the form of an absolute rule, of the necessity which is involved in every will that is perfectly free, or determined only by the necessity of its own nature. This, it is certain, is the ideal of right. It is right as right would exist in a world the inhabitants of which were governed in their action by the dictates of pure reason, without drawback or disturbing influence of any kind. Men, however, are cast in a physical mould. They are all, therefore, more or less under the sway of external conditions. Their wills, so far as governed by outward necessity, are, in fact, not free, but are wayward and arbitrary. Positive or actual right, then, can never pretend to satisfy the ideal of right; because positive or actual means finite, and all that is finite is subject to change; is doomed to pass away and to be replaced by something else. In the world of human affairs whatever actually puts itself forward as right can establish its claim to be so regarded only in so far as it approximates to the ideal. But the touch of imperfection on what comes nearest to perfection, is what makes it human.[1] Thus right, even objective right, is not fixed or final in its forms, but undergoes a process of evolution. That is always right, positive or actual right, which infers the harmony of the particular and the universal will. But the will of the people, which, as realized in the state, is the objective standard of right, is a living motive force, and so the standard of right must change as time goes on.

As opposed to each other in the state, and yet as existing interdependently there, the universal will and the

[1] *Cf. Tess of the D'Urbervilles*, chap. xxiv.

particular will may be distinguished thus :—The universal will is the will of the people, unified through the existence of the state ; determined in its activity by the inward necessity of will as will ; realized in the ethical system of the state ; mediated in the continuance of its activity by the concrete sovereign authority of the state, or by individuals whose affirmation of their own freedom comes by-and-by to be stamped with that authority ; and destined, as so mediated, to substantiate itself from time to time in new forms that render obsolete and supersede the forms which it previously assumed. The particular will, on the other hand, is the will of any of the individuals who are included in the number of the people and in the membership of the state, whether the will of the individual so included be coincident with the will of any other such individual or not, and whether it be coincident with the universal will or not.

In the unity of the state, then, the universal will and the plurality of individual wills are brought together. They are brought together in such a way that the distinction between universal and particular is neither effaced nor suppressed. The universal will, for its part, bears such an emphasis of necessity as can only, in the case of will, be derived from the unalloyed purity of will in its own nature. This is the true explanation of the all-binding authority of the laws, customs and other institutions of the state, in and through which the universal will is expressed. Laws, customs, and institutions, however, since they are subject to the conditions of finite existence, can never be adequate to the reason which they body forth. Accordingly they are bound, sooner or later, to fall under the wearing-out influence of time. Their tendency, from the first, is always to harden into rigid forms. These forms, in proportion to their increasing rigidity, thwart

and impede the further activity of the spiritual force which they themselves in some measure reveal. But the persistence of this spiritual force, the constant striving of the rational will of the people to find more perfect outcome, gradually renders effete all established modes of social, political and legal ideas. On pain of the world's corruption, the *Weltgeist*, or the spirit of man, condemns the old order to yield place to new.

Positive or actual right may now be defined as the rational system of rules and observances bearing on the conduct of life, in all the complexity of experience into which, through the state as founded on the natural union of the people, a mass of human beings grows in virtue of the spiritual nature in which human beings share.[1]

[1] *Cf.* Stirling's *Lectures on The Philosophy of Law*, p. 24.

# CHAPTER VI

## RIGHT

### SECTION I.—POSITIVE RIGHT.

SINCE self-conscious being has freedom for its essence, and since freedom is the ground of right, it follows that right has its origin in self-conscious being. Specify right as positive right, and specify self-conscious being as human consciousness,—the conclusion, then, is that positive right comes into existence in human consciousness. Two explanations have to be made.

1. In this connection human consciousness does not mean the consciousness of mankind as a whole, any more than it means that of the individual man. History has a long course to run before mankind gets wrought together into an organic whole, pervaded by a common consciousness. On the other hand, as long as mankind consists merely of an aggregate of family groups, there neither is nor can be amongst those families any common consciousness of right. Such consciousness is kept down by the dominance of that love of the individual as such on which the natural group of the family is founded. The principle of love is indispensable to the constitution of every natural group of human beings, whether the group be small or large. The principle is indispensable also to the continued subsistence of every such natural group. The natural union of the people presupposes a common ancestry, a

common speech, and a common country. In the natural union of the people, therefore, the principle operates in reference to individuals only as they are regarded from one point of view. The point of view is that of their all having sprung from one and the same stock, and of their all belonging by birth to one and the same land. Patriotic sentiment, indeed, includes within its compass those who form the domestic circle of the patriot. But it does so, without special regard to any characteristic of theirs, except that which is characteristic also of the people as a whole. Patriotic sentiment is even consistent with the formation and the maintenance of individual relations with foreigners of a more intimate kind than with natives of one's own country. When the small natural group of the family, which owes its cohesion to love of the individual as such, comes to be merged, though not lost, in the larger natural union of the people which subsists through the same principle differently directed or drawn out, then only is it that the consciousness of right begins to arise. For it is then, and not till then, that men have their eyes opened to interests which they have in common with one another as fellow-countrymen. It is then, and not till then, that through the mutual relations which consequently emerge they learn to recognize themselves and others as entitled to respect in virtue of their being, as possessors of will, the subjects of these relations.

2. The actual existence of right assumes the form of outward and positive fact. For the existence of right in this wise, the mere consciousness of right is not enough. Right does not become real or concrete, till the relations of human life are governed by the requirements of right, or by what right ordains. These requirements find expression in rules of conduct which, with reference to given circumstances, either prescribe the doing of something or

forbid the doing of it. Hence, immediately, or from the first, the consciousness of right is identical with the will that what is in harmony with the injunction of right shall be carried out into actual existence as a fact. But the very mention of a state of fact which is in agreement with right, suggests and involves the possibility of a state of fact which is not in agreement with right. Along, then, with the thought of right as demanding realization, there goes the thought of its perhaps failing to be realized. This negative, when it is represented by fact, takes on the positive aspect of wrong.

Though the consciousness of right is the ultimate cause or birth-principle of the state, right becomes positive or is realized only in and through the state. Suppose that before the state comes into existence, many, most, or all of the natural groups afterwards recognized as co-ordinate, have grown like one another as regards the forms of those relations of fact which naturally arise among the members of a group, or among the members of different groups. The common rational nature of man makes such a supposition credible enough. The use and wont, however, of the various groups, though on subsequent reflection it may be found to have been the same for all, is at the time use and wont for this group separately, and for that group separately. There is as yet no common or general consciousness of mutual relation and organic unity among the groups. There is no common consciousness of actual use and wont. There is, therefore, no common consciousness of that use and wont as right. It is in and through the state that the vague, undefined sentiment of community among those who form the natural group of the people is raised into a common consciousness of national identity. It is in and through the state that what has *de facto* been use and wont for this, that, and the other family, for this, that, and

the other clan, is recognized as substantially one and the same throughout, and, in its entirety, is recognized as the concrete of right. The moment the state comes into existence and right is thus realized, what have hitherto been no more than special usages get liberated from the element of contingency in which they took their rise, are transmuted into categories or universals, and acquire, on their outward side, the character of institutions of right.

The term special usages, as applied here, may be criticized as an anachronism, for special implies general as its correlative, and the recognition of the usages in question as general is, by hypothesis, due to retrospection. But usages, supposed to exist before the state comes into existence, may justifiably be described as special on two grounds: (1) because they have reference in each case to a definite or special subject-matter; and (2) because, although in point of fact so widespread as to be general, they are observances only of this, that, and the other group as such, not consciously of the people as a whole.

Among the earliest institutions of right must for certain be reckoned property, marriage, and succession or inheritance. These institutions represent the most fundamental relations in which human beings can stand relatively to one another. In the course of social evolution changes inevitably occur in the forms of these institutions of right. But the permanence of the relations on which they are based is the guaranty of the substantial permanence of the institutions.

In the course of social evolution new and more complex relations are established. Corresponding to these relations new institutions of right arise, subject, like the rest, to the inherent necessity of undergoing changes of form from time to time. Nay, the changes are not always mere changes of form. Some of even the earliest institutions of right

have either ceased to exist, or are tending to their final downfall. Slavery may be mentioned as an example. The same fate has overtaken some of the institutions of later origin, and may be in store for others. The free energy of spirit never fails in the long run to adapt all institutions of right to its own requirements, or to sweep away any institution that will not bear to be reformed. But even slavery was once, not only an institution, but an institution of right. So, too, with other institutions that have gone the same way, or that are bound yet to go the same way. The sanction of the state is the support of all the institutions of right. When that sanction is withdrawn from any institution, then the institution must either change or fall. But the continuance or the withdrawal of the sanction depends on the susceptibility of the state to the influence of ideas which find advocacy at first only in, or by a minority. The minority may be a minority of one.

It is only sometimes, of course, that the ideas of a minority have that in them which assures their ultimate triumph over ideas which have found embodiment in institutions of right. The growth of right depends on the assertive force of the individual judgment and will, as against the resistive force, the *vis inertiæ* of the state and the institutions of right. The growth of right within a state is the condition of that state's being a progressive state. The activity, therefore, of the individual will is essential to the continuous political regeneration which alone can save a people from decay and death. But the individual will can be effective to this end, only in so far as it expresses the ideal of right better than existing institutions do. In other words, the individual will must, to this end, be affirmative of the universal, not of the mere particular, though, as already said, both universal and particular are implied or go together in the individual

The particular element in human will may be warrantably spoken of as the only element that is explicit before the state comes into existence. In the state the particular will is distinguished from the universal will. Each stands out in contrast with the other. The contrast is vital; and the particular can as little as the universal be eliminated or excluded from the notion of the state and from the notion of right.

In the state, then, the unity, the inward necessity, the autonomy of the human will, is manifested co-existently with the variety, the contingency, the heteronomy of the same will.

*Ruler and Subjects.*—The distinction between those who govern and those who are governed, is involved of necessity in the constitution of the state. This can best be shown by setting up the contrary hypothesis, and arguing on it to the logical conclusion. Suppose, then, that respect for the private will of the individual were made out to be the true and only ground of political freedom. On the assumption thus made, nothing could be done by the state, nor could anything be done for the state, except what had previously been decreed by the voice and the vote of all the individual members of the state. Upholders, indeed, of the individualistic theory are usually content to insist on the suffrages, not of all, but of a majority. Their compromise with principle is due to their recognizing absolute or perfect unanimity on particular issues as practically impossible. But they really undermine the very conception of political freedom on which they profess to take their stand. For they condemn the will of the minority, as well when the minority is large as when it is small, to be relentlessly crushed down.

On the hypothesis of pure individualism anything truly in the nature of a political constitution is shut out. All

that is required to accomplish the ends of the state is the presence of these two conditions: (1) a central body, devoid of any will of its own, but sitting in permanence, for the purpose of deliberating on what may seem to be the ends of the state; and (2) some sort of machinery or arrangement for convening the individual members of the state, ascertaining their view on such proposals as may be brought before them, and in this way determining what ought to be done. But until the state finds embodiment in individual will and activity it is a mere name. It is a bare or abstract form. It has no substantial being, no reality. Until it becomes possessed of a constitution it does not become a concrete organism, and, in short, it does not live. To be organic is the condition of life. For the state to be organic the antithesis as well as the mutual relation of a whole and its parts must be made actual and manifest in the contrast of ruler and subjects.

Eminent thinkers have returned different answers to the question, What was the general attitude of man to man before men came to be united in society? This question, it is obvious, takes for granted that in the remote past there was actually a time when human beings co-existed in a mass which involved no principle of cohesion, and which was therefore a mass not organized. Whether the assumption be true or false, it is quite certain that speculations founding on the assumption have for long exercised and do continue to exercise a powerful influence on juristic and political thought. A pre-social condition of human life being supposed, different views of that condition give rise to different hypotheses in explanation of the actual emergence of the fundamental contrast between ruler and subjects.

The two theories which stand out as by far the most important in their bearing on subsequent discussion of the

subject are those of Hobbes and Rousseau. Both of them agree in postulating a primitive anarchy. Both attribute the ending of that pre-social condition to a compact or contract entered into by the anarchic human units. Both conceive the civil state which results from the compact to be a system of absolutism or despotism. The tendency of Hobbes, however, is to centre the despotism in one man—the monarch; while the outcome of Rousseau's reasoning is to establish the despotism of the majority of the mass of the people.

Starting from the position that death is the worst evil which can happen, and that self-preservation is the highest good, Hobbes argues that the first law of nature is to ward off this evil and to pursue this good. Since every man in the primitive condition is able to inflict mortal hurt on the man beside him, all are on much the same level. None is under any restraint as to doing what his inclination moves him to do. Mutual enmity, accompanied by mutual fear, is the relation of men to one another in the state of nature: *bellum omnium contra omnes.* But sooner or later the motive of self-preservation is bound to issue in a treaty of peace. Each man, then, stipulates to give up his native freedom on condition that all the rest shall do the same. Freedom here, you will understand, is misnamed for caprice. The bargain or contract for the surrender of individual freedom is the product, not of social instinct, but of selfishness and fear. The contract can be carried out only through the bringing of all under the dominion of one, who is thus enabled to suppress the tendency to mutual destruction. The sovereign of a state is entitled to say, as in fact was said by Louis XIV. of France, *L'état c'est moi.* The will of the sovereign is law to all the other members of the state, who, for their part, are merely subjects. He is the leviathan who swallows up all the smaller fish. Right and wrong

are what the sovereign wills. Right is what he commands; wrong is what he prohibits. Among possible forms of government, that which actually exists is the best for those who are subject to it. Any effort to bring about a change is intolerable, because rebellion or disobedience threatens a lapse back into the state of nature, through the breaking down of the original compact. As against the sovereign, or in reference to the sovereign, the subject has no rights whatever. On the other hand, the sovereign is exempt from any constraint or guidance of law. The duty of unqualified obedience to the sovereign admits of only one exception: this, namely, that, as self-preservation is the very object for which the state exists, no person is obliged to commit suicide. Hobbes was over ninety years of age when he died in 1679. He thus lived through one of the most eventful periods in English history, and his favour for the Stuarts accounts for his doctrine of absolutism. The grounds of that doctrine could alone, if anything could, have justified the Stuart policy from first to last.

Rousseau, too, who died in 1778, just a century later than Hobbes, had his theory shaped in its distinctive features by the circumstances of his time and country. But his point of view was quite different from that of Hobbes. Rousseau's doctrine has been well described as the cry of anguish of an enslaved people, a strong protest against a worn-out despotism. The effect which it had in connection with the French Revolution is too well known to need emphasis here.

Rousseau's war against the corrupt social order that was then not yet overthrown, is waged especially in his work, laureated by the Academy of Dijon in 1753, and entitled *On the Origin and Grounds of the Inequality among Men.* In this work the enthusiasm for absolute equality makes Rousseau counsel men to return to the savage state

as being the state of nature. The perversion of the state of nature by the cultivation of science and art is, he contends, the sole cause of the inequality of human conditions. In his book on the *Social Contract*, dated 1762, he sets himself to deal directly with the problem of social organization. According to the theory which he there presents, men are born free, being free and equal in the state of nature. Society is constituted only in virtue of their free consent, and not by force; for men can submit to force out of prudence, but never out of duty. It is therefore the free will of individuals in the mass which is considered as the source of law. The social problem, then, is formulated by Rousseau thus: to discover a form of association which defends and protects by the whole force of all, the person and the goods of each member of the association, and by which each, although united to all the others, obeys nevertheless only himself, and so remains free as he was before.

Both for Hobbes and for Rousseau, the wills which by their concurrence and compact give origin to the state, and therefore to the fundamental contrast between ruler and subjects, are purely particular wills. Further, for Rousseau the freedom which, in default of the return of men to the savage state, he sets up as the object to be realized by the civil or social state, is after all but the unrestraint of the particular or private will. This will amounts to caprice. The general will, figured by Rousseau, is at best but a reflection of the majority of particular or private wills. It is consequently liable at all times to express what is contingent and therefore what is arbitrary.

Kant is a sceptic as to there ever having been, in fact, a pre-social condition of mankind, but he holds by the theory of an original contract as the basis of civil society. In order to find a logical explanation of this original

contract, he is constrained to assume a pre-social condition of some sort. He leaves the character of it an open question. Whether it was a condition of unbroken peace, as in the mythic golden age of the ancient world, or was a condition of internecine strife, Kant does not pretend to say. He is clear, indeed, that the pre-social condition of mankind need not be represented as a state of absolute injustice, though it must of necessity be represented as under no rule of right or law. Even, then, if the ordinary relations among men are supposed to have been determined otherwise than merely by force, yet, in the event of disagreement in any matter, there could be no other way of settling the dispute than by the exercise of private force. For since by hypothesis there was no organization and therefore no community of will, there was no public force to sanction public authority, nor was there any public authority to claim effect or obedience. Kant sees, however, that the transition to a civil state could never be made, unless the distinction between mine and thine were already in a provisional way recognized and acted on. Driven, then, by logic to make a demand which can hardly be called logical, he postulates, even in the hypothetical state of nature, a provisory assertion, and, on the other hand, a provisory concession of the ownership of outward objects. In effect he lays the foundation of a juridical order on the quicksands of an imagined mass of men, co-existing as individuals, but not yet unified on a principle of organic cohesion. The theory of an original contract as the basis of civil society, has in truth no support whatever from experience. All experience begins with observation, and observation has never anywhere been able to reach further back than to the existence of men in natural groups, held together in every case by a moral cement of some sort. Demonstration of the principle of growth or evolution, as

applicable to society, destroys the supposition on which the hypothesis of an initial compact rests. The supposition is, that at some definite point of time the hitherto unassociated units of a mass of human beings resolved to form themselves into an organized body, and through the adoption of a constitution became a state. But the idea of contract as involved in the origin of society is an anachronism. Historical research bears out the contention of Sir Henry Maine, that "society progresses from status to contract"—status in this context being taken to denote such social conditions as are neither directly nor indirectly the product of agreement. The place of contract in the scheme of juristic ideas corresponds to the place thus assigned to it in the order of time.

The notion of sovereign authority, or more briefly of sovereignty, comes now into the foreground. Power which is ultimate, power from the assertion of which there is no appeal, power, in fine, which carries with it the evidence of necessity—this, and this alone, is sovereign power.

In the state the sovereign power, as thus described, emanates from the rational will of the people. But, thought of simply in this way, the sovereign power is a mere abstract power. It is a potency not yet realized or made actual. In order to become positive or substantial, it must be exercised or put forth. Further, in order to be put forth it must find a medium or organ. In the state, the individual, or the body of individuals, distinguished as the ruler or the government, is the organ of the sovereign power. Whatever be the form which the government assumes, the government exists and can exist only as the expression of the organized will of the community. Of course, the more nearly the government approaches to a true or pure democracy, the more obvious is the dependence of the government for its existence on the rational or unified

will of the people. But even in the case of a despotic government, under which the people regarded as individuals are of no account, it is still the unified will of the people, as expressed in the institutions of right, that enables the government to live and to live on.

Being, then, the organ of the sovereign power, the government comes, naturally enough, by a metonomy of which language furnishes many examples, to be called the sovereign power, or the sovereign authority. It is the outward expression, the outward manifestation, of the principle of power which flows from the inward necessity that belongs to the rational will even of the individual and *a fortiori* of the nation. The government is therefore quite entitled, in reference to every individual member of the state, to be named the sovereign authority. It is so entitled because it is the concrete embodiment of that authority.

Any ambiguity such as has been indicated in the notion of sovereignty may be got rid of by distinguishing between the legal and the political sovereignty. The legal sovereignty is in the government; the political sovereignty is in the public will. It is not always easy to determine, as among different parts of a composite government, which of them is really the chief, and which of them therefore is specifically the embodiment of the legal sovereignty. This, however, is rather a question of constitutional law than a concern of political philosophy or of jurisprudence. What we have to think of at present is the government of the whole. As a whole the government has a will which it puts forth independently of all other wills in the state. The government is therefore a person in the same sense as its subjects are persons.

The notion of person, or of personality, is grounded on an abstraction. It expresses the element of identity

among the various members of the state — the fact, namely, that they are all of them embodiments of will, and that, because of their being so, they are all of them subjects of right. But it leaves out of account the other qualities of men, and especially the qualities which differentiate man from man.

Since the state is the sphere of right, and since it is only within that sphere that men are able to realize the potentiality of their nature, and to live self-determined lives, membership of the state is the basis of existence as a person. A person, then, may be thus defined: A human being, or a group of human beings, viewed as a unit member of the state and as capable, in virtue of inclusion within the state, of having rights and of acting freely in the exercise of rights.

Government considered as a whole is, therefore, a person in the same sense as its subjects are persons. But it differs from them in this respect: that whereas they severally express the private will which has a place within the sphere of right, it—government—is the organ of the public will.

*Functions of Government.*—Though the functions of the sovereign authority may be distributed among various agents, the principle of organization serves to explain the unity of government. Proceeding on the assumption of this unity, the functions of government may be broadly distinguished into three species. More minute analysis is justified by the logical interest of its results, but hardly by what it contributes to jurisprudence. The three main species, then, of government functions are: (1) legislative, (2) executive, and (3) judicial. What relates to taxation may be brought under the first head. As between the functions of the executive and those of the judiciary, a clear line cannot always be drawn on the ground of

practice, but on the ground of theory the division is well enough marked.

Kant has condensed into a brief statement the connection of the different functions of government with one another. It is, he says, the part of the legislature to lay down general rules or laws, which it belongs to the judiciary to apply in particular cases, and in obedience to which the executive has to do its work. On this showing, each of the three powers ought to be exercised by different organs of the government. In one sense, as Kant points out, the three powers are to be thought of as co-ordinate because they are complementary units in the constitution of the concrete sovereign authority. But in respect of the nature of the different functions, the executive and the judicial must be accounted subordinate to the legislative. Hence, he argues, no one of the three ought to trench on the province of either of the other two. A complete separation of functions, it may be granted, and of the organs through which the several functions are exercised, is in accordance with strict principle. But historical influences have much more to do with the shaping of political constitutions than abstract logic has. In the experience, for example, of this country, the relation of the different organs of government to one another has been determined by a long series of modifying expedients and only approximates to that mutual independence on which political theory towards the close of the eighteenth century laid so much stress.

It is only in so far as the government is the exponent of right that it has a valid claim on the allegiance of its subjects. The will of the people may perhaps have ceased to be active in the determination of right; but, even so, that will is at all events expressed in, and represented by,

the institutions of right. To these institutions, to the laws, the government itself is subject.

In a state which has not yet attained to a substantially democratic constitution, the policy or the conduct of the government may be contrary to the established forms of right, or contrary to such new affirmation of right as the people may have reached. The subjects have then a right, if by organized effort among themselves they are able to make the right effective, to overthrow the government and to set up another in its stead. This is the right of rebellion. Rebellion is a qualified or conditional right; but once the condition is satisfied the right becomes an absolute one.

On the other hand, in a state which is well abreast of the modern ideal of polity, and has developed a truly or essentially democratic constitution, under whatever peculiarity of form, the government is little likely to violate the recognized institutions of right. Even if it pursue a policy or do some act contrary to the continuously assertive force of the will of the people, the subjects can seldom be driven into rebellion, for the simple reason that they can bring about a change of government without their having recourse to this extreme but still, in certain circumstances, valid right.

The right of rebellion or revolution has several times been illustrated in our national history. The two most memorable, as well as latest occasions, were the dethronement and execution of Charles I., and, somewhat later, the expulsion of the Stuart dynasty.

In connection with the former of these events, Kant has a long and elaborate argument to show that the people of England were guilty of an unspeakable outrage on the principle of right in taking the means which they took to put an end to the misrule of Charles. Kant lays it down in the most unqualified terms that "it is the duty of the

people to bear any abuse of the supreme power, even though it should be considered to be unbearable." He is horrified at the very thought of the formal execution of a monarch. He insists that this is incomparably worse than the assassination of a monarch. Assassination, he argues in support of his conclusion, may be regarded as unpremeditated, whereas execution cannot be thought of as anything else than a deliberate act. Regicide, to Kant, is "a crime which always remains such and can never be expiated." It is, he maintains, analogous to or on a par with "that sin which the theologians declare can neither be forgiven in this world nor in the next." It is not the defensibility or the indefensibility of capital punishment which is here in question. Nor is it even the prudence or the imprudence of the sentence that was carried out. It is the fundamental right or unright of the people to rid themselves of a ruler who had been false to every pledge, and disloyal to the law which he was sworn to uphold. Kant fails to keep in view that the sovereign so called is, notwithstanding the office he fills, subject to the institutions of right and to the law. Kant fails also to keep in view that the sovereign, in so far as he is a traitor to these, is himself within the jurisdiction and liable to the condemnation of that sovereign power of which he is in the usual case the representative, the embodiment, and sometimes the agent. An extraordinary tribunal may have to be constituted for a trial such as that of Charles. But on the principle of right it seems impossible to doubt that his execution was justified by his treason against the majesty of England. Such treason on the part of a king of England meant and could only mean treason against the law, treason against the institutions of right established in England, and therefore treason against the sovereign principle which has its source in the public will.

The relation of subjects to the sovereign authority binds the subjects to obey what the sovereign authority ordains. Up to the full measure of its strength the government, for its part, has the right to compel obedience, if obedience be refused. Otherwise the fundamental distinction between those who govern and those who are governed would be practically done away with. The people would be given over to anarchy. In other words, the state would be destroyed.

It may seem at first sight as if there were here support for the conclusion of Hobbes in favour of absolutism, or, as Pope afterwards phrased it, "the right divine of kings to govern wrong." If the government is entitled to enforce obedience, and if the subjects are bound to obey, then there is no freedom in the sense of mere unrestraint of the individual will. But freedom means something else than this. It means self-determination. Submission to the laws ceases to be a thraldom, the moment the will of the individual who is called on to obey the laws affirms them. Obedience to the governing power is then consistent with autonomy. The affirmation of the laws by the will of the individual is more especially evident when that will is actively concerned in the making of the laws. This taking part in legislation is the first in point of importance of the conditions of individual freedom within the state. But even when the will of the individual has no share in the making of the laws, there may still be affirmation by it of the laws as right, and therefore there may still be the consciousness of freedom. When the laws are old established institutions of right, the reason which they embodied at first may still hold good. In this case the will of the individual, in so far as it is rational, must harmonize with the laws. This is the second in point of importance of the conditions of individual freedom within

the state. The reason, however, of an old established institution of right may no longer hold good. In this case, the will of the individual, in so far as it is rational, cannot be in harmony with the law. Resistance to the law and the effort to change the law in accordance with a better ideal are together the third in point of importance of the conditions of individual freedom within the state.

*Principles of Government.*—The movement of reform within the state is a movement of the self-same spirit that previously found an embodiment for itself in the institution, the law, or whatever it be which has now come to be the object of attack. Progress, indeed, is possible and assured only through discontent with things as on the whole they are, and through effort to bring about a change. Such discontent and such effort betoken that continual war of the spirit of the people against itself which is inevitable. In the state the element of unrest, represented by novel or recurrent assertions of the private judgment or will, is of quite as vital consequence as is the element of rest, represented by the positive institutions that have been set up and the ordinances that have been enacted by the public or universal will.

These two principles, the principle of conservation—the static principle, as it may be called—and the principle of innovation—the kinetic principle, as it may be called—are both of them essential to the life of the state. They are the constitutive principles of the state. Any overstrain of either principle, any carrying of either to an extreme, tends by so much to destroy the life of the state.

Every progressive state owes what vigour it has to the maintenance within it of something like a fair balance between the two antagonistic principles. On the one hand, what may be termed the positive or substantial forms of the public or universal will—the traditions,

namely, that have been handed down, the laws, the customary observances — these are valid, or have the character of right, as against the self-will or the private judgment of any member of the state. On the other hand, the spontaneity of the private will of the individuals who compose the state is not allowed in a progressive state to be crushed or paralyzed by what may be regarded as the positive or substantial forms of the public will. When it is at variance with established forms, the private will, in so far as it holds of reason, and is not mere caprice, tends to acquire validity as against those forms.

The two opposite principles which are implicit in the notion of the state, counteract each other, not indeed absolutely, as if they were in constant equipoise, for that would mean an end of development; but so as to save the organism of the state, on the one hand from hardening into a fossil, on the other hand from dissolving into atoms, and in either case from death.

For steady political growth, a certain normal relation must be maintained between the static principle and the kinetic principle. When either of the principles is pushed too far, new emphasis of the opposite principle is needed to restore the normal relation. Such a recoil can hardly occur often in the life of the individual; but it is periodic, as history bears witness, in the larger life of the nation and the world. By a gradual evolution the two principles, the one negative of the other, which are implicit in the notion of the state, have now become explicit. In other words, they have made themselves manifest in the two great parties which divide the nation. As there are only the two fundamental principles of mutual repugnance involved in the state, there are only two parties with an ultimate justification for their existence. No doubt each party may be made up of various sections, marked off

from one another by special or temporary aims. But this is only to say that men who hold by a principle in common may yet differ as to how, in such or such a state of facts, the principle ought to be applied. When occasion arises for making a party stand or a party move, the practical obligation imposed by the principle points to the compromising of differences among the several groups. Particulars, details, special ends, as distinguished from a whole policy or a whole measure to which they relate, are not of supreme moment. Details, it is true, make up a policy; but a policy is more than the details.

It would be disastrous for the commonwealth if, as represented by parties, the dividing line between the static principle and the kinetic principle were not clearly marked. Of course, in point of fact, neither party is wholly without the quality which gives character to the other. The one that seeks its ideal in a new state of things finds much in the old, which, in substance, and often in form, is worth preserving. So, too, the one which takes its stand on things as they are would yet not stop the wheels of progress. But all the same, the antagonism of parties goes far below the surface; and as it originates deep down in a difference of principle, so it always manifests itself in a difference of tendency. Government by party, then, consists in giving effect to a policy which expresses the tendency of one side, as modified more or less by the tendency of the other side. The dominant tendency must in general be that of the majority or the stronger party. To this party, in virtue of its relative strength, properly belongs the initiation of proposals which fall within the province of the other party to criticize and, if it can, to amend.

It would be impossible to vindicate party at all, if the opposite principles on which the different parties ground their existence implied any moral distinction. To connect

with either party the notion of intrinsic right, would by necessary inference be to lay on the other the stigma of intrinsic wrong. Even the fanatics of political controversy seldom go that length. It is a true instinct which thus avoids a denial of right to either of the principles that give rise to political difference. Did the two hostile parties not stand on the same moral plane, the extinction of one of them would demonstrably be necessary for the salvation of the state, and that mutual esteem which is by no means rare between political adversaries could not be explained with any regard to the fit conduct of life.

A party in the political sense, according to Burke's well known definition, is "a body of men united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed."

It is sometimes made an objection to government by party, that party opposition is not a permanent possibility within the state. But though, as time goes on, and brings with it new conditions so that the party forms may change and change again, the permanence of the principles is of sheer necessity. The permanence of the principles necessitates the permanence, under whatever altered modes, of party opposition, as that through which the relation of reason is bodied forth.

*Forms of Government.*—The form of government always bears a close relation to the stage of spiritual development which the mass of a people has reached. Corresponding, therefore, to the three stages which we have marked in the development of the notion of freedom, there are three principal forms of the state. These are (1) autocracy, (2) aristocracy, and (3) democracy. In the order of time or historical succession the earliest form of the state is the autocratic, as seen in the empires of the East. The next is the aristocratic, as typified by the civic institutions of

ancient Greece. The third and last is the democratic, as represented by the political outcome of the modern spirit. All three forms of the state, of course, are to be found co-existing in the world at the present moment. But this simply means that the progress of freedom, the development of the human spirit, has not been uniform throughout the world. Certain nations, nay, certain races, have scarcely, if at all, as yet participated in the movement. They are therefore outside the interest of history, however much they may be within the interest of other departments of science. History takes cognizance of races and peoples and individuals only in so far as they have contributed to the realizing of the absolute or spiritual aim. The famous saying of the great Roman—"Happy is the nation that has no annals"—is as far as it can be from expressing truth, unless happiness be held to consist in that immunity from unrest and conscious effort which befits mere animal existence. Of the peoples, on the other hand, that claim the regard of history, some have fulfilled their destiny and have either passed away from the actual stage of the world-drama, or, having achieved the utmost of which their ideal of freedom rendered them in any initiative sense capable, have ceased to be progressive. Others are still in process of working out their destiny, while others, again, are but at the outset of their career. The furthest point, however, reached in any quarter, is the point to which the whole inevitably tends. Once the notion of the freedom of all men has made itself the basis of polity in any country, the goal of all the other nations is found there.

From the very nature of the conditions under which historical development takes place, the fact is easily explained that, even where the nearest approach has been made to the democratic ideal, the form of the state retains elements which properly belong to an earlier ideal.

There is, in fact, no state at present existing which can be said to conform purely to any one of the three distinct types. But it would be difficult indeed to find any actual state in which one or other of the three clearly marked types or forms did not so predominate as to give character to the constitution.

The infinite value of the individual was first set forth in the Christian religion. But it was not for many centuries—it was not, indeed, till the period of the Reformation—that that value was expressed in at least the religious reference. Then inevitably the principle had to be acknowledged that man, in virtue merely of his being man, was free. Even yet men are, for the most part, not free. Only in some parts of the world is the truth of human existence recognized, and in those parts theory and practice are often at variance. But, all the same, the notion of freedom as the birthright of every man has established itself in the world ; and if history is read as throwing light on what is to come, the whole tendency of movement for the future can only be to realize more and more perfectly the notion thus expressed. Democracy claims the future, as autocracy and aristocracy have claimed the past.

Autocracy rather than monarchy has been taken as an example of government, because monarchy, although etymologically it expresses the same idea, may in fact be consistent with democratic essentials. Our own country—a crowned republic, as Tennyson describes it—is a case in point.

## CHAPTER VI

### RIGHT

#### SECTION II.—OBJECTIVE RIGHT

THE objective idea of right is the universal will as that is realized in the state. It is the rational will of the community as that is expressed in the laws and customary observances which demand conformity on the part of the individual. Right, as in this sense objective, is nevertheless abstract right, for it stands out as independent of affirmation by any particular or individual will. In abstract right it is the universal or objective or public will alone that is considered and asserted. The actual human being is considered only in reference to that will, and as capable of determining himself in harmony with it. In other words, he is considered only in so far as he is a being possessed of a will, and as he is, in virtue of this will, a subject of right.

Jurisprudence, however, is concerned not merely with the universal will, but also with the particular will in relation to the universal will. Accordingly, right has further to be thought of as realized or made positive in the activity of the individual. In order to be made predicable of the conduct, or of any act, of the individual, right has to be explained as the correspondence or harmony of the will of the individual with the universal will. But here it has to be noted that all forthput of will

on the part of the individual requires of necessity reference to some object. A person is a person in virtue of the capacity to have rights and of the capacity to act freely in the exercise of rights. When the import of a right is examined it will be found that a person is a person by reason of his power or control over objects. Specify this power in the case of a particular person with reference to such or such a particular matter, and, the power being exercised with reference to the standard of right, the result is *a* right of which the person is the subject, or which is vested in the person.

Regarded in itself, or abstractly, as the power of a person over an object, a right has no moral import or significance. It is formal or abstract right, not substantial or positive right. The assertion of abstract right may involve serious injury to the person against whom it is asserted. In extreme cases it may lead to the destruction of the victim. This is what is meant by the maxim, *Summa jus summa injuria.* Shylock may have an abstract right to a pound of Antonio's flesh, and were it not for Portia's acumen in discovering how to make the consequences recoil on the usurer's own head, Shylock may be able to exact, with all the force of the state to back him, what has been stipulated in the bond. But the abstract right of Shylock means death to Antonio.

"I recollect of a case," says Dr. Stirling, in his *Lectures on the Philosophy of Law*, "where a poor man nearly ruined himself by the consistency of his faith in abstract or formal right. He was the landlord of a workshop, and the tenant, without consent asked or given, took it upon him to enlarge the windows in this workshop, and open new ones. 'The workshop is mine,' said the landlord, 'and you have infringed my rights.' 'But what I have done,' said the tenant, 'I have done at my own expense,

and what I have done is an improvement to the property.' 'I admit that,' said the landlord, 'but you had no right to make alterations in *my* property without *my* consent, and I will take you to law therefore.' Accordingly this landlord did take this tenant to law; he lost his case before judge after judge, and he was just on the point of taking it to the House of Lords, when death kindly stepped in, and by *its* abstraction did justice to *his*. Here was a true instance of exalted devotion to abstract right, but the concrete injury did not stop there; for the tenant, disgusted with the proceedings of the landlord, neglected his business, neglected the property, allowed a valuable boiler to burst, became in the end a bankrupt, and left a workshop that was worth a great deal to the landlord, worth next to nothing to his heirs. So much for the worship of formality."

It has now to be seen how the right or law which is established by any people bodies itself forth. It is only, of course, in positive right, not in the principles out of which that right develops, that difference appears as between people and people, or nation and nation.

In the first place, then, positive right expresses the conviction of right which is shared by the mass of the nation at such or such a stage of the nation's culture, and which, through being acted on in general by the units of that mass whenever a given state of facts recurs, passes into recognized use and wont or habitual practice.

Right which originates thus, and which shows itself thus, is spoken of in the books as customary right. This naming is quite to be approved of, if it be not held to countenance the widespread error which sees in custom the parent of right. Those who deduce right from custom entirely reverse the order of thought which in the present case is also the order of fact. The rational instinct of right, if not always the rational apprehension of right, must pre-

vail throughout the community before a moral usage can exist. It is true, however, that custom, once it does exist, reacts on the self-consciousness of the nation. In doing so it brings the reason, the will which produced the custom, into clear and still more clear perception by the people. The result is to strengthen the hold of custom on their lives. Customary right, it is easy to understand, is at first the only expression of right. In the youth of a nation, and in the still undeveloped organism of the state, men have hardly begun to reflect on themselves or to criticize the existing moral conditions of their existence. But at length the stage of reflection is reached, and inevitably the traditionary ethic fails. The legal and the moral system of the past crumbles away. Now in this reference, now in that, it is perceived to be insufficient, or, it may be, effete. New adjustments come to be necessary. While these, no doubt, may be made without conscious effort, yet, in the main, they involve deliberate acts of will.

Here, then, considerations of the second mode in which right makes itself manifest are arrived at. This second mode is through the will of the people bodying itself forth in the enactment of general or abstract rules for the ordering of the people's life. Right which finds expression in this way through the medium of words is called legal right, in distinction from customary right. Although legal right, or the *jus scriptum*, as it is often named, is thus opposed to customary right, or the *jus non scriptum*, the one may be no more than a reproduction or a declaration of the other. The opposition, therefore, depends rather on form than on substance. To a large extent, indeed, the *jus scriptum*, as the product of legislation, either supplements the *jus non scriptum* or changes it. But to some extent, and not by any means to a small extent, the *jus scriptum* simply declares or formulates the *jus non scriptum*.

When customary right is not so settled, or is not so evident as to be beyond dispute, it becomes expedient, and it may even become necessary, to get rid of any uncertainty that happens to exist. Definiteness is called for both in the interest of the government and of those who are governed. It is called for in the interest of the government, viewed as the executive, because the executive function depends for its proper exercise on the clearest knowledge of right. It is called for in the interest of those who are governed, lest they should be made to suffer from the arbitrary assertion of right.

In the exercise of its legislative function, the supreme power in the state as the organ of the universal or public will, either translates *jus non scriptum* into *jus scriptum*, or gives authoritative expression to views of right which have so far won acceptance, although they may not yet have established themselves as customary.

As a preventive of legislation issuing in contradiction of the people's conviction of right, representative government carries with it obvious advantage, although it would be too much to say that representative government is a surety for legislation always being in harmony with the people's conviction of right.

Right or law, determined in virtue of the legislative function of the supreme or sovereign power, is distinguished as legal right. In respect of its being operative only after it has been published, it is also frequently referred to as promulgated right. The ceremony which in earlier times and in a ruder society was deemed essential to due promulgation, may come by-and-by to be dispensed with. Till the middle of the sixteenth century, the practice in Scotland was to proclaim a new statute in all the shires, burghs and baron courts throughout the realm. Printing rendered this superfluous, and by degrees

the practice ceased. At length the only formality of promulgation came to be publication at the Market Cross of Edinburgh. Forty days after such publication, the statute became operative. Since the union of the Parliaments in 1707, statutes affecting Scotland have been in the same position as statutes affecting England. That is to say, no ceremony of promulgation is required. Two explanations have been suggested, either of which may be sufficient of itself. The first, and probably the more relevant explanation, is that printing is really a publication. The other is that, according to the theory of the constitution, every subject of the realm is a party to the making of the laws, as being present in Parliament either by himself or by his representative.

It is important to observe why the unwritten law of a country—the *jus non scriptum*—is so called. It is so called, not because it does not, as a matter of fact, exist, partially at least, in writing ; but because it has not been promulgated by the legislature in writing. The unwritten law of Scotland, for example, includes, and is represented by, the works of our institutional writers, the special treatises which rank as text-books, and the reports of judicial decisions. The written law, on the other hand, technically so named, comprehends the statutes made by Parliament, and less strictly the written regulations issued by subordinate legislatures. Instances of such regulations are orders in Council, and the rules of Court made by judges.

To consuetude and legislation, the two ways already discussed in which right comes to outward existence, some authorities add as a third mode, science. They distinguish the product of scientific investigation as scientific right, or, in consideration of its being worked out by the industry of jurists, juristic right. Those who uphold this view em-

ploy the phrases *Communio opinio doctorum* and *Usus fori* in a technical sense. They argue in support of their position that there are elements of right implicit in the spirit of the national system, which neither custom nor legislation may bring out; that such elements come to be discovered in the process of scientific induction; and that therefore science has a good claim to be regarded as one of the special sources of right.

This view is open to objection. Even on the showing of those who seek to establish the conclusion, the science of right is limited in its function to finding out by the method of interpretation what is involved in actually existent right. No doubt the outcome of scientific research into the principles of right may in a sense acquire authority. No doubt the judgments of the Courts may, in like manner, acquire authority. But they do so only under this proviso, that they express a conviction of right which has already bodied itself forth as custom—if not indeed as custom conformed to by the whole people, at any rate as custom conformed to by a section of the people within a given area.

But the pretensions of science to be one of the special sources of right or law fall before the considerations now to be stated. For the realizing of right in custom there is necessary an initial energy of the common will; which energy must, however instinctively, be put forth. Similarly for the realizing of right through legislation there is necessary the same initial energy of will; which must be put forth, not instinctively, but with conscious purpose in view of a definite end. The scientific exposition of right, however, involves no activity of the common will directed to the realizing of itself in institutions and laws. The results of legal science may conceivably remain outside of the domain of actual right for a very long time, not to say

for ever. They must so remain until in respect of them the will of the people is put forth in one or other of the two modes through which alone that will manifests itself as originative of right.

It is to be observed here, however, that the common law includes all that, without its having yet been expressed, either in custom or in statute, is logically consistent with what is so expressed.

The changes which positive right undergoes are the effect of new determinations of right, made in one or other of the two possible ways. Now, it is plain that a new determination of right, and its result, a new law, must be such as can co-exist with forms of right already recognized, with laws already extant; or it must be such as to supersede and do away with them in whole or in part. No form of positive right is ever abrogated otherwise than by the springing up of a new form.

It may seem, indeed, at first sight as if there were exceptions. It may seem as if, sometimes, a custom or a law simply fell into desuetude, or simply suffered repeal by an enactment which put nothing in its stead. But the mere negation of a previous affirmation of right amounts to the setting up of a new and different affirmation.

Custom, from its very nature, is of force to abrogate custom; for the unobserved influence which gave rise to a particular mode of right continues at work and tends gradually to transform its own product. So, too, statute is of force to abrogate statute, because the will expressed in the later statute is the same will as that expressed in the former, only more fully developed, or expressed with reference to new circumstance. Further, statute is of force to abrogate custom; because the deliberate declaration of the rational will of the community has of necessity a superior validity to that more crude, less certainly defined,

expression of it which is conveyed through custom. For the same reason, custom is not of force to abrogate statute, except where the state is not yet well knit together, and the sovereign authority is in consequence weak.

In England no statute loses force through non-use or through the growth and persistence of contrary custom. This holds true also of statutes affecting Scotland which have been passed since 1707 by the legislature of the United Kingdom. In order to the repeal of any English statute, or of any statute affecting Scotland which has been passed since the Union, a definite act of the legislature is required.

Say that a statutory enactment which may be distinguished as number two, repeals a previous one, which may be called number one; and say that number three expressly repeals number two. The effect is not to restore number one, but is merely to leave room for the operation of the common law, or for new provisions which the repealing statute number three, itself introduces. When a repealing statute substitutes new provisions, the repeal does not take effect until the substituted provisions come into force.

The fact that Scots statutes before the Union often fell into desuetude and became inoperative through contrary usage, is to be accounted for by the unsettled state of the country, and by the want of strength on the part of the government in early times. Only where the central authority is feeble can a custom at variance with any law sanctioned by that authority establish itself. Note, in this connection, that mere non-usage for ever so long a period never sufficed to abrogate a Scots statute. There must have been some positive and unchecked usage contrary to the statute, of a nature to evidence popular revolt against the enactment; and there must

be proof that observance of the statute is no longer for the good of the community since manners or circumstances have changed.[1]

When by the discipline of the individual in and through the state the harmony of his private will with the public will has become on the whole spontaneous ; when, in other words, the conformity of the individual to the recognized standard of right has become habitual, then the life of the individual is a moral life, in the original meaning of the word moral. In common speech, morality and right, or morality and law, are broadly marked off from each other, and are indeed set in sharp contrast to each other. Now, morality and right are, each of them, capable of being considered abstractly ; and abstract morality does, without doubt, present a very different aspect from abstract right. Both morality and right, if we look at them as separate or abstract, are manifestations of will. But whereas in right so looked at, will is embodied in something merely external, in morality, looked at in the same way, will is realized only internally in the individual subject, and the individual subject, as such, is contingent. The concrete moral life is attained only when the will of the individual is of use and wont one with the will of the whole. Subjective morality, as opposed to abstract right, sets up *within the individual the standard of right which*, as it at first presents itself, *is without*. "Only," it has been pointed out with true historical insight, "only after men had long mechanically and unreflectingly obeyed law, did they come to make its prescripts their own principles, did they come to see that the principles were but what their own nature and no mere external authority commanded. But the moment the faintest edge of such an experience as this was

[1] Bute *v.* More, 1870, 9 M. 180 ; *cf.* Downs *v.* Stevenson, 1882, 9 R. (I.C.) 11, per S. Young.

received into the heart, morality had begun."[1] On this showing, law is the basis of morals. The ordinary doctrine which grounds law and morals, has no such historical support, even were there as much to be said for it in theory.

The free activity of the human spirit is the ground of right. But the actual working out of right, the evolution of right, within the limits of this or that territory, must be kept in view. And it must be remembered that the law of the land is always the outcome of what is distinctive in the *national* spirit, as well as of what is common to the self-consciousness of mankind. The political constitution and the system of right or law by which a nation is distinguished, reflect the same spirit or genius which comes out in branches of the culture of the people. Each of the activities of the national spirit has a moulding or shaping influence on all the rest. But there are, besides, external influences which, in their own way, affect the growth of the national spirit, and which give character to the outcome of its various activities. Chief among these external influences may be mentioned that of climate, that of geographical situation, and that of neighbouring peoples in the relations both of peace and of war. The history of a people is determined by the blended force of all such influences, and the history of a people is just the development of the national spirit in time or in course of time.

The provisional definition of jurisprudence may now be accepted as established through the argument which has so far been followed to a conclusion. The definition may, indeed, admit of being put into a different form, but in substance it must present jurisprudence as the science of the human will, in the distinction of the parti-

[1] *Cf.* Stirling's *Philosophy of Law*, pp. 34, 35.

cular from the universal, and in the relation of the particular to the universal.

In view of the explanation reached as to the origin and the nature of right, and as to the origin and the nature of the state, it may perhaps be of some advantage to fill out the definition of jurisprudence with specific mention of right and the state. Without, then, really going beyond, or away from, the definition which has been kept in view all along, its terms may be modified, to the effect of defining jurisprudence thus: The science of right, as right is realized or made actual in and through the state, and as it involves within the state not only the contrast but also the mutual relation between the public will and the private will.

## CHAPTER VI

### SECTION III.—PUBLIC AND PRIVATE RIGHT

I. PUBLIC RIGHT.—On a survey of the various departments of positive right as subsisting within the limits of any state, a primary division suggests itself into public right and private right. This division is determined by reference to the difference among jural relations in respect of the persons between whom they are established. In some cases these relations are established between the state as itself a person, and individuals and corporations as likewise persons. In all other cases the relations are established between members of the state as such.

Public right as subsisting within the state covers the relations of the state to the citizen and of the citizen to the state. The relations thus contemplated are either political, in the strictest sense of the word, or personal, or economic.

Under the first head—political law—falls the whole subject of the constitution of the government. The main subdivisions of this subject are these: the relation of the people as unit members of an organized body to that organized body as a whole, namely, to the state, and through the state to one another; the relation of dependencies and colonies to the ruling or suzerain state or to the mother country; and, in cases where the constitution involves a federal union, the relation of the federal units to the central power, and mediately to one another.

Under the second head—the law which concerns the personal relations of the citizens to the state—it is usual to enumerate the regulation of the public service, criminal law, poor law, the law relating to imbeciles and lunatics, the rules of civil legislation, and ecclesiastical law.

Under the third head—the law of the economic relations between the state and the subjects of the state, fiscal law, as it may briefly be called—the matter dealt with is the fixing and the apportioning of taxation and other pecuniary burdens, whether general or local.

Private law subsisting within the state covers the relations of the citizen to the citizen. Those relations are either domestic, such, that is to say, as arise out of life in the family; or social, such as arise out of life in society at large.

The law of the domestic relations includes among its departments the law of husband and wife, the law of parent and child, the law of guardian and ward, the law of succession, and the law of trusts. The law of trusts, however, goes beyond its original sphere, and while still to be reckoned as part of the law of the domestic relations, it is also to be reckoned as part of the law of the social relations.

For the rest, the law of the social relations is co-extensive with the wide domain of contract. It is specialized in reference to sale, hiring, loan, deposit, pledge, partnership, factory, cautionry, insurance, bills of exchange, and a number of other forms of contract. Among those other forms of contract fall to be mentioned in modern law certain relations such as master and servant, landlord and tenant, which in earlier times were relations of status or of domestic law rather than relations of contract.

II. PRIVATE RIGHT.—The notion of person, as it has been shewn, is grounded on an abstraction. It ex-

presses only the element of identity among men—the fact that they are all of them subjects of will and therefore subjects of right. Because of its thus expressing only the element of identity among men, the notion implies the equality of all persons as such. But the equality of persons does not imply the equality of men. The doctrine that men are by nature equal is contradicted by observation of the physical and intellectual differences which in point of fact do exist among men. It is contradicted also, and with final decisiveness, by reason of the manifold differences into which the unity of the spiritual force that embodies itself in individuals inevitably breaks out. Differences among men there have always been; differences there must always be. Were it possible, indeed, to get rid of such differences progress would be at an end. It may be urged that progress would be at an end only because nothing remained to be desired, only because perfection had been reached. But what an idea of perfection is here presented. Perfect uniformity, perfect identity, with every element of diversity removed,—this would simply mean an unutterable blank. Perfect identity is just another way of saying perfect nonentity. The individual would be lost in the mass, for the individual subsists as an individual only in and through difference from other individuals. The mass, did it conceivably hold together still, would be inert, stagnant, dead. All interest would be taken out of life were there no need unsatisfied. Without difference among the units of society, no consciousness of further need could ever arise. Life itself would thus be reduced to mere existence, and mere existence is virtually or in effect mere non-existence.

An abstract person is thinkable. That is to say, one can think of a being with a capacity for rights and yet not think of that capacity as to any extent realized. But the

free will which explains the capacity is in its very nature an activity. It is a putting forth of effort from within towards what is without. Consequently, a person, though one can think of him in the abstract, cannot exist in the abstract. His capacity for rights must find some mode of expression. It must make itself real, or actual, or positive. In other words, his will must show some definite outcome. It must embody itself in what is external. Now, of all that exists externally to the self, that which stands nearest, in respect of the likeness that shines through the difference, is another self. It is another person. The first, therefore, and most imperious injunction of right is this: Be a person and hold in reverence the personality of others.

It is as a person, and only as a person, not as a human being in the full reckoning of his attributes as this or that human being, that a man stands in the sphere of right. Hence it follows that the relations of men to one another, so far as these relations are relations of right or can be determined by law, are relations of persons, as persons, to one another. Right can exist only between persons. No thing can ever have a right. The relations of right, however, in which persons stand to one another have reference to the outward goods which man needs for his existence and well-being. Right is not concerned with external objects, considered as natural objects manifold and various. Such external objects, so considered, are the earth and the products of the earth, and what man makes of those products. But right or law regards them in their general aspect as destined for man and for the satisfaction of man's needs. This common attribute of external objects is expressed when we speak of them as things. A thing has been defined by Kant to be "whatever is unconditionally subjected to the wants of man, and absolutely at men's disposal."

Men, therefore, are persons in virtue of their having a capacity to exercise will, and, through the exercise of will, to acquire or to lose rights. Were a being with such capacity to remain perfectly inactive, were he never to put forth will at all, the capacity would be a mere capacity. The person would be a mere abstract person, in effect a non-existent person. In order to become an actual person, a being who is capable of will must exert the power of will, and so must realize in some shape or other the distinctive possibility of his nature. To realize means to make real, to make substantial, to make concrete; just, for example, as an ideal of beauty is made real in a statue. Accordingly, to realize the will means to embody it in what is external to itself. If, then, my will is to realize itself, or become realized in an external thing, that can only mean that I take possession of the thing, that I make it mine by putting my will into it, or, in other words, that I enter into the property of the thing. Here it becomes evident how the notion of property is connected with that of person. The notion of property is that of the embodiment in some outward form of the free will of a person. The essence of property is this, that a material object, an object void of will and void of meaning, is by such or such a person's appropriating grasp of it, converted into an embodiment of that person's free will. As long as the grasp holds, the object remains a symbol of the will which is thus put forth. Two elements, then, very different from each other, go together or are blended in the notion of property. The first of them is the free will of a person, the second is an external object or a thing. These two elements, although they are so different, are in truth essential the one to the other. For, on the one hand, the person ceases to be abstract only through the object. On the other hand, the object comes to have meaning and function only when, by

being appropriated, it is taken up into the life of the person. Property, therefore, is not, as it is sometimes said to be, an artificial extension of the person. On the contrary, it is the necessary embodiment of the person. It is the realization of the person. It is the person made manifest. Because of this, the first requirement of right—to be a person and to hold in reverence the personality of others—carries with it as an immediate corollary, the injunction to acquire property oneself and to respect the property of others. What property is not here in question, nor how much property. But property of some kind and of some amount is indispensable to the real existence of a person.

It is through property that jural relations, or relations of right, originate and subsist; for every right has reference to some outward object. Every relation, therefore, of a person to a person, which comes under the category of right, or under the scope of law, involves a material interest. In other words, it has reference to some thing that bears the character of property. A jural relation implies a relation between persons each of whom as a person is the subject of certain rights. Such of these rights as are involved in a given state of facts, definitely within the compass of one bond of connection, form the matter or material of a jural relation. The relation, however, although it is established through the persons, is as yet a relation of mere fact. The constituent facts, taken separately, may be either physical facts, or events, or legal institutions. A physical fact in this context may be typified by a house; an event, by death; a legal institution, by marriage. But in order to transform the relation of fact into a jural relation or a relation of right—a *Rechtsverhältniss*, as the Germans call it—the matter presented must be determined by law. It must be brought under the application of a rule of right. The rule of law which

governs the relation may be one already clearly recognized, or it may be only implicit. In the latter case, it is the function of the judge to make the rule explicit. The rule of law has been called the formal element in the relation of right. This expression may be allowed, provided we keep in view that form and matter are not really separable. The rule of law, therefore, cannot be imposed as from without. It must be in the relation, and derived from, the legal institutions to which the various elements in the relation severally correspond.

Because a jural relation is a relation of persons to persons, or, in the simplest case, of a person to a person, the notion of obligation is reached by an easy transition from the notion of a jural relation. Apart, indeed, from a jural relation, there neither is, nor can be, any obligation. An obligation, however, is not a synonym for a jural relation. The bond of connection between the persons who are the parties implicated in a relation of right, may be thought of by itself. It may be thought of, that is to say, as a separate element in the analysis of such a relation. Now, this bond is what is meant by an obligation. An obligation is the tie which of necessity unites the persons who stand in a relation of right.

P and Q, for example, stand in a given relation of right. They do so by reason of the fact that each of them has some specific right, even if in certain cases it be only a right of surrender, in respect of the outward object which forms the matter of the relation. The right of P necessarily qualifies or limits that of Q, and the right of Q necessarily qualifies or limits that of P. In other words, the right of the one is a burden imposed on the other. The right and the burden are equal, or, you may say, they are the same thing looked at from different points of view. P's right as against Q is Q's duty towards P,

and so in every case. In common speech the burden or the duty which corresponds to a right is called an obligation. According to the narrow meaning thus given to the word *obligation*, a right and an obligation are opposites. But the true distinction is between a right on the one hand, and a duty or a debt on the other hand. Obligation is the notion that embraces both right and duty or debt.

Every infringement of right involves either an unintentional or an intentional contradiction of what is acknowledged by the community to be right. Where the wrong is unintentional it is appropriately enough called relative, and where it is intentional it is with equal fitness called absolute. The distinction is one which demands somewhat closer consideration. How, it may be asked, can any wrong be unintentional and in this sense relative? Is not the test of moral action, the disposition of mind, the will or the want of will to do wrong? This must be admitted if we have regard to the quality of the action as such. But if we have regard to the effect of the action, and, in the sphere of actual right, of positive law, we must have regard to the effect of the action; then we come to see how an unintentional wrong is possible, and, indeed, apt to be frequent. Take, for instance, the case of a contract. The relation implied in a contract is that of two particular or private wills coming together under reference to the universal or public will. Because both of the contracting wills are particular, because they are the wills, not of abstract persons, but of men, and because the subject-matter of the contract is also particular, the element of contingency comes in. Each, therefore, of the wills may uphold as against the other its own particular position to be that of right, and may do so without denying the universal will, or right as right. In this case one or other of the two parties to the contract inflicts wrong,

and one or other of them suffers wrong. But the wrong has not been intended as such. While, then, it is bound to be got rid of, the civil suit in which the divergence issues, admits of no initiative on the part of the state. This is so because the state is the realized universal, and the universal will, or right as right, has not been called in question or outraged. The judicial process for the redress of a civil injury, as a relative wrong is usually styled, is, like every other judicial process, conducted in accordance with the rules laid down by the state. Further, it is conducted under guidance of those officers of the state through whom the judicial function is exercised. Thus in an ultimate sense the remedy for a civil injury has to be thought of as afforded by the state, and also as enforced by the state. But the remedy is one to which either the individual who suffers wrong or some one on his behalf must have recourse. The state has no interest to interfere, because the principle of right has not been attacked.

The notion of civil injury, or of relative wrong, imports then a *de facto* contradiction of right in this or that particular case, not a deliberate contradiction of the principle of right. It is thus merely relative to a particular person or to particular persons. The notion of crime, on the other hand, or of absolute wrong, imports, as will subsequently be pointed out, deliberate contradiction of the principle of right. A wrong, however, which is absolute, in the sense of its being unqualified as an offence against the absolute or universal will embodied in the state, always implies at the same time a relative wrong, a wrong done to a particular person or to particular persons. Thus a crime always implies a civil injury; though not always, nor even in the instances most commonly to be met with, does a civil injury imply a crime. In order, then, to cover

the whole of the cases to which the term is in use to be applied, a civil injury may be defined as the effect produced on any person by an actual attack on his right, whether the contradiction of right be merely relative to the particular case without any intention on the part of the person who *de facto* does the wrong to contravene the principle of right, or be relative to the particular case and at the same time wilfully negative of right as right.

A civil injury considered apart from its possible connection with a crime presupposes the subsistence as between C and D of a legal obligation which D, say, violates. D may violate the obligation either positively or negatively. He violates the obligation negatively, whether of set purpose or through carelessness, by failure to perform the duty required of him.

When only a civil injury is chargeable against D, there is of course no question of penalty. Still, the civil injury gives rise on the part of C to a claim for redress. If the claim cannot be satisfied by arrangement between the parties, then the state has an interest to enforce, through its tribunals, at the instance of C, the making good to him by D of the loss which has been sustained.

Although a civil injury involves no denial of right as right, it yet involves the violation or the negation of a particular right. In order that the right so violated or negated may be re-established or re-affirmed, it is necessary to negate the negation. This is what is implied in the notion of reparation. In the relation which we have supposed to exist between C and D, the infringement by D of C's right cannot be allowed to remain, unless C himself decline to move for redress. D's legal responsibility, whether it be actively or passively incurred—whether, that is to say, it be incurred by doing something which ought not to be done, or by leaving undone some-

thing which ought to be done—follows from D's being recognized as a person. It may or may not be possible to restore C to the position in which he stood before the civil injury accrued to him. If C cannot be so restored, D must compensate him for the loss caused to him. Reparation thus means the putting of things back as they were, or the giving of an equivalent in cases where restoration is out of the question.

From the necessity that connects a civil injury with the perpetration of every crime, the criminal, besides being liable to bear such punishment as may be held commensurate with the crime, is liable also to repair the private wrong, so far as the means of doing so exist, by restoring the person wronged to the position of material advantage in which that person previously stood. In the crime of murder it is of course impossible to restore the person murdered; but an indemnification is due to his heirs by the person guilty of the crime. No claim for assythment, as it is called in Scots law, lies where the criminal has suffered the pains of law, for in such a case the crime is held to be expiated. But the assythment may be made the ground of an action wherever a person pleads on a remission, because his so pleading is an acknowledgment of the crime. It may also be the ground of an action wherever the crime has been proved by the decision of a court, provided the sentence of death has not been carried out. If the criminal has fled and has been fugitated, the assythment may be obtained from the donatory of the escheat of the criminal.

## CHAPTER VII

### THE INFRINGEMENT OF POSITIVE RIGHT: CRIME AND CIVIL INJURY; PUNISHMENT OR PENALTY AND REPARATION.

THE very suggestion that right may be infringed carries along with it a reference to the act of the individual. Right being, by hypothesis, the expression of the universal will, any contradiction of right must, it is evident, involve an expression of the individual will. But the individual will may be exercised at one time under one, and at another time under another, of two quite dissimilar conditions. Thus, on such or such an occasion my will may be exerted to a given effect, with perfect knowledge on my part of what in the circumstances is right; whereas on the next occasion I may act in ignorance or under a mistaken apprehension of what is really right. For ignorance or for mistake I am not always to blame. I may have done my best, and may yet have failed, to make sure of acting in accordance with right. In either case—whether, that is to say, my will be put forth with clear perception of right or not—my act, if as a matter of fact it be in contradiction of right, is an act that answers to the definition of a wrong.

Wrong which is marked by intention may appropriately enough be called absolute wrong, in opposition to wrong which arises in the absence of intention and which is therefore spoken of as relative. Absolute wrong as thus

described is otherwise distinguished as crime, and relative wrong as civil injury. The difference between crime and civil injury demands somewhat closer examination. In immediate connection with the notion of crime the notion of punishment falls to be discussed; and so in relation to the notion of civil injury, the notion of reparation.

The act of the criminal has a double import. In the first place it involves the denial of right as right. And in the second place it involves the assertion of his own particular or subjective will as absolute.

Looked at in the first aspect—looked at, in other words, as the negation of the universal will, as the avowed contradiction of right—the act is in its very nature devoid of rational support, and bears on the face of it its own condemnation. In order to bring back the affirmative which has been overthrown, in order to vindicate the universal will which has been contravened, it becomes necessary to negate the negation, or, in less technical phrase, to annul the criminal act. Force or violence, in the widest sense of the term, is the mode in which the primary negation, the denial of right involved in the criminal act, expresses itself; and, since what has to be done in order to re-affirm right is to negate the negation, is, if possible, to render the criminal act of no effect, and at all events to destroy the criminal will as such, a further putting forth of force is imperative by way of counter-agent. So we get to the notion of punishment or penalty.

But the act of the criminal may be viewed in another aspect. It may be viewed, namely, as the absolute assertion of the individual or particular will. What, then, does this amount to? It amounts to this: that, in virtue of his being a free agent, the criminal by implication declares that *his* will is what ought to be right or law. And what is it that he has willed? He has willed a

resort to force. There is therefore no hardship, there is no arbitrary coercion, in bringing him under the law which he has himself set up. On the contrary, there is an obvious necessity of reason.

How, then, is he to be brought under this law of his own making? If by the counter-assertion of another particular will, where is the series of retaliatory acts thus begun to end? Revenge, it is plain, does not vindicate right or the universal will; for, like the crime which has provoked it, revenge is merely the outcome of particular will. When the universal will has been outraged, there is only one way in which it can be vindicated as against the particular will by which it has been attacked, and that one way is by judicial retribution.

Punishment may now be perceived as, in truth, "the complement of criminal desert."

There is no ground in reason for the tendency which shows itself so prevalent in these days to strip punishment of its retributive character, to say that punishment is not to be inflicted for the outrage done to the universal will, and to make it only a means to a twofold end—the moral reformation of the criminal, and the deterring of others from the commission of crime. Whenever punishment is inflicted for any other reason than that the wrong which has been committed demands penal treatment, it ceases to be punishment and loses all connection with right.

No doubt in the measuring out of punishment we are entitled to take into account various considerations of expediency, such as those on which the humanitarian sentiment of our time lays so much stress; but in order to establish the right to punish at all, and especially to punish capitally, we must find a deeper principle than utility. This deeper principle is found when we recognize

the truth that punishment is the affirmation of right by the negation of wrong, as that wrong is existent in the will of the criminal. The criminal's will being realized in his person and in his property, it is through these, by fine, or by imprisonment, or if need be by death, that the wrong is annulled and the right vindicated.

It depends to some extent on the stage of moral culture at which a nation has arrived, what degree of severity is called for in the punishment meted out in respect of a particular crime or species of crime with a view to re-establish the principle of right which has been violated by the commission of the crime. The progress of civilization is always attended with a mitigation of the character of penal awards. The more sensitive the conscience of the nation, or even of the class to which the criminal belongs, the more burning is the brand of disgrace or infamy, and the less need is there to inflict extreme forms of punishment. Relatively, for example, to their social position, the fraudulent directors of the City of Glasgow Bank were to the full as severely punished by their being imprisoned for periods measured by so many months, as criminals of a lower social grade would be by a sentence of penal servitude for life.

The ignominy of conviction, it is of consequence to note, is far from being proportioned in a community like ours to the actual amount of the penalty imposed. It is quality rather than quantity that is here of account.

Further, in the administration of criminal law within a country which is well advanced in civilization, the prevalence or the infrequency of a particular crime is in general a good and sufficient reason for leaving to the discretion of the judge the amount of the punishment necessary to vindicate in the public esteem the majesty of the broken law.

Of course there are certain violations of right in respect

of which the punishment cannot safely be put to any extent within the arbitrary determination of the Court. Thus, in some countries, for the crimes of murder and of high treason neither the selection of the punishment nor the measure of the punishment is left to the discretion of the judge. The menace to the state which those crimes involve, is deemed too formidable to admit of any extenuation ; and it is only where circumstances can be pleaded in extenuation of the guilt which has been brought home to a person accused, that the Court can ever be entitled to show leniency or to inflict a smaller penalty than the crime usually infers. As regards other crimes than those or such as those already considered, the discretion of the judge is often limited, but rather by the fixing of the maximum than by the fixing of the minimum penalty which he may impose.

Even, however, in cases of the gravest crime, which, were they of common occurrence, would constitute a peril to the state, and which as regards the penalty to be imposed exclude judicial discretion, the tendency of an advanced society to mitigate the severity of punishments finds illustration in the exercise by the sovereign authority of the prerogative of mercy. This, it must be confessed, is a dangerous expedient, unless indeed it be accompanied by such an exhibition of the grounds of intervention in the special instance as will protect the agents of the sovereign power against the imputation or the suspicion of arbitrary conduct.

Another influence constantly at work to diminish the severity of punishment is to be traced to the fact that there are few crimes which do not involve a civil injury as well, and so the reparation of the civil injury comes in many cases to be regarded as sufficient to reassert the universal will, when right has been actually infringed.

A civil injury falls to be classed along with a crime under the general notion of a wrong, but at the same time it differs from a crime in respect of the condition of the will which it implies.

How, then, can it be that any wrong is unintentional? Is not the disposition of mind, the will or the want of will to do wrong, the test of moral action? This latter question must be answered in the affirmative, if regard be had merely to the quality of the action as such; but if regard be had to the effect of the action—and in the sphere of actual right, of positive law, heed is bound to be paid to the effect of the action—then it can be seen how an unintentional wrong is possible, and indeed apt to be very frequent.

Take, for instance, the case of a contract; say a contract for the sale of goods. The relation implied in the contract is that of two particular wills coming together under reference on the part of both, not only to the particular goods proposed to be sold, but also to the universal will as laying down the standard of right. Now, on account of the contracting wills being both of them particular—being the wills of men, in short, and not of mere abstract persons representative of the principle of pure reason, unmixed with other elements which tend to limitation—and on account, further, of the object or matter of the contract being also particular, the element of contingency comes in.

Thus, suppose one purchase certain materials which another, the seller, warrants fit for a specified purpose; suppose, after damage has been caused through using the materials delivered, it is discovered—what there had been no means of discovering before—that they were not the materials which had been stipulated for; suppose the order had been faithfully executed, when in fact it was not so;

suppose, therefore, the claim for the indemnification of the damage was resisted. In order to make good that claim the question was taken into Court. Here the two cases are absolutely the same—namely, to maintain what in the circumstances may be demonstrable as right. Although by supposition it could be proved that the seller was actually in the wrong, yet equally by supposition it was not consciously or deliberately a wrong.

As regards the effect on the buyer, it makes not the slightest difference whether the seller acted under a mistake or of set purpose. It is a fact that the materials delivered were other than those which had been bargained for; and to this fact, looked at merely as a fact, is confessedly due the damage which had been done.

But, as regards the attitude of the one will towards the universal will, and therefore as regards the quality of the act, it makes all the difference in the world whether he meant to break through the terms of the agreement or not. It was not so meant: and it follows, therefore, that punishment cannot be given for the consequences of failure to properly implement the contract. What may be ordained by the Court to be paid is not to be thought of as at all in the nature of a penalty. It is for reparation of loss; that loss being attributable to the failure of the contract, although not brought about by any wish or intention to contravene right. Reparation is the prescript or logical requirement of right in respect of civil injury, just as penalty is in respect of crime. But the two notions —reparation and penalty—are quite exclusive the one of the other, however closely they may sometimes be associated, from the fact that every crime involves a civil injury.

In the case of a civil injury resulting from such a breach of contract as that, each of the particular wills involved in the contract may, on the emergence of the result, without

either of them denying right as right, uphold as against the other its own particular position to be that of right. As a matter of fact, one or other of the two parties to the contract inflicts a wrong, one or other of them suffers a wrong; but the wrong as such has not been intended, and, while it is bound to be got rid of, the civil action or suit in which the divergence issues admits of no initiative on the part of the state. The reason is obvious. The state is the realized universal, and the universal will, or right as right, has not been called in question or outraged.

The judicial process for the redress of a civil injury is, of course, like every other judicial process, conducted in accordance with rules laid down by the state, and under conduct of the officers of the state through whom the judicial function of the state is exercised. But the remedy for a civil injury, although in an ultimate sense to be thought of as afforded by the state, and also as enforced by the state, is a remedy to which the individual who suffers the wrong, or at any rate some one on his behalf, must have recourse. The state, as I have shown, has no interest to interfere; because the principle of right has not been attacked.

It is worthy of note that in early law the broad distinction which modern jurisprudence draws between a crime and a civil injury is not, even practically, recognized. Sir Henry Maine points out[1] that, according to the law of ancient communities, offences which are customarily regarded as crimes or offences against the state are treated exclusively as civil injuries or offences simply against the individual. Thus, by the early Roman law, not only theft but assault and violent robbery are dealt with as civil injuries and "requited by a payment of money. This peculiarity, however," Maine goes on to say, "is most

[1] *Cf. Ancient Law*, pp. 370–1.

strongly brought out in the consolidated laws of the Germanic tribes. Without an exception they describe an immense system of money compensations for homicide, and, with few exceptions, as large a scheme of compensation for minor injuries." He quotes Mr Kemble in support: "Under Anglo-Saxon law a sum was placed on the life of every free man according to his rank, and a corresponding sum on every wound that could be inflicted on his person, for nearly every injury that could be done to his civil rights, honour, or peace; the sum being aggravated according to adventitious circumstances."[1]

There is an element of truth in the paradox that might is right. The proposition, indeed, is capable of being construed to mean that the brute force of one man, as superior to that of another man, constitutes and measures the right of the one as against the other. The facts of nature generalized by Darwin in the phrase "survival of the fittest," and, long before Darwin's time, touched upon by Shakspeare,[2] to the same effect in the familiar saying "the weakest goes to the wall," may seem to bear out the conclusion whereby right is ultimately reduced to might—to the might, that is to say, of individual strength.

But it is perilous to argue from what is observed in nature (even if by nature be meant human nature in its uncivilized aspect) to what lies within the compass of the moral world. The sphere of right, it must never be forgotten, is quite distinct from the sphere of mere physical existence. The state, although founded upon the natural union of the people, stands out in contrast as affirmative of a necessity against which the inequalities of individual strength count for nothing.

Nevertheless, physical force is essential to the subsistence

[1] *Cf. Anglo-Saxons*, i. p. 177.
[2] *Romeo and Juliet*, Act i. Sc. 1.

of the state. The unified will of the community is bound to be asserted by force against any individual member of the community who sets up his particular will against it, and to this end the state must be able to avail itself, when need arises, of the whole physical force of the people.

For the most part, it is true, this cumulative force is held in reserve, the mere fact of its existence being sufficient to obviate its actual use. But, all the same, the might of the state is the sanction of right, without which sanction right would never be secure against attack and outrage. It is only lawless force that is a menace to right. The organized force of the community, exercised by the state as occasion may require, is opposed to lawless force, and, as able to bear down lawless force, insures the victory of right.

# CHAPTER VIII

## STATUS

I. INDIVIDUAL STATUS.—1. Individual: (*a*) Private persons; (*b*) Public persons. 2. Natural: (*a*) Simple or Individual; (*b*) Composite or Collective.

II. GENERAL STATUS.—1. Subjects: (*a*) Natural-born subjects; (*b*) Aliens. 2. Denization. 3. Naturalization.

I. INDIVIDUAL STATUS.—The jural capacity of a person, as fixed by positive law, was called by the Roman lawyers that person's *caput* or *status*. Among modern writers on jurisprudence a distinction has been drawn between *status civilis* and *status naturalis*. According to this distinction, *status civilis* means such a jural capacity as that denoted in the Roman law by the term *caput* or *status*, together with all the peculiarities attached to it by law and on which single rights depend, whereas *status naturalis* means such a natural being, or such a *de facto* existence, as is necessary to ground jural capacity, together with those physical properties which give rise to special jural consequences. In the discussion of natural status in the case of an actual individual we need only consider these three conditions: (1) human form; (2) birth; (3) life.

1. The possession of a human form is the first requisite of a natural status. No question of the kind seems to have been brought before the Scots Courts; but commentators on the Roman law have deduced from this first condition, principles which could hardly fail to receive

application, did a question of the kind arise with us. Provided that the form be in truth a human form, it is not essential that it should be such as is usually seen. Let it be ever so strange, it is yet, if only it be really human, sufficient to establish a claim to treatment as a person. Such an abnormal departure from the ordinary type is called, in language of the Roman law, a portent (*portentum*). On the other hand, that which, though born of a woman, is destitute of those physical features which are characteristic or distinctive of the human race, is spoken of as a monster (*monstrum*), and is not held to be capable of having any right. All the same, the continued existence of such a being is not allowed to depend on the mere will of its parents. For their moral advantage it may even be accounted a child.

2. The other conditions of natural status which I have mentioned, namely, birth and life, may for convenience be taken together. A human being cannot be regarded as actually the subject of any rights unless and until it be actually born—unless and until, that is to say, in some way or other it be separated from its mother. What is still in the womb, the embryo, is in strictness regarded as part of the mother. But the law recognizes the possibilities which lie wrapped up in the embryo. It recognizes them to the effect of forbidding all acts which may interfere with the due growth and the eventual birth of the fœtus. Our criminal law goes on this principle, as, for example, in punishing for the procuring of abortion. Although a child, in order to become actually the subject of rights, must not only be born, but be born alive, it is laid down as a principle of natural law that, in those cases in which a child can derive benefit from the rule, its jural capacity is to be held as dating from the time, not of its birth, but of its conception. In all other cases its jural capacity is

to be held as dating from the time of its birth. In the law of Scotland the interests of the child *in utero* are looked to in a number of important matters. Thus, in succession under deed, any one who is entitled to the position of heir, by virtue of the particular destination contained in the deed, has his rights secured to him by law, even if it be the fact that he is not born and not even conceived when the succession opens. When, however, the succession is *ab intestato*, he who at the date of the opening of the succession is the nearest heir in life, acquires an indefeasible right by the mere fact of his being alive, or, as before 1874, by service, and is not required to denude in favour of any nearer heir who was not conceived at the date of the opening of the succession, though he is obliged to denude in favour of a nearer heir, conceived but not born before the opening of the succession. The *conditio si sine liberis decesserit* further illustrates the same principle.

Every jural relation must, as I have before explained, be a relation of a person to a person in respect of some outward object. One, then, of the persons who are necessarily involved in such a relation, must have the right or interest which arises out of the relation with reference to the particular subject-matter. The person who has this right or interest is, in virtue of his having it, the centre of the jural relation.

A person may be in the position now described without his having done anything to bring about the result; or he may come to be interested in jural relations through the activity of his own will directed to that end. When the conditions are determined under which, in general, a person can be or can become the centre of jural relations, then what is called the absolute status of the person is determined. In either case these are necessary con-

ditions. Under what conditions can a person be, independently of his own will, interested in jural relations? The answer to this question determines the capacity of the person to have rights. Under what conditions can a person, by virtue of his own free will, come to be interested in jural relations? The answer to this question determines the capacity of the person to act in the exercise of rights.

In the Roman system of law the first of the two elements in the notion of status was by far the more important. The capacity, that is to say, to have rights was far more important than the capacity to act in the exercise of rights. The reason is plain. The Romans had not arrived at that conception of freedom which makes it the birthright of man as man. For them freedom was the attribute of some men, or some classes of men, not the native right of all men. Consequently amongst the Romans there were bound to be legal inequalities as between man and man. There were bound to be inequalities, recognized by positive law, in respect of the capacity of different men or classes of men to have rights. These inequalities can no longer exist when all men, simply because they are men, are acknowledged to be free men. Under the influence of modern thought, some of the limitations of the capacity to have rights, which stood out most prominently in the Roman system of law, have wholly vanished. Others, like that of the paternal power, have been largely modified and decreased.

In our consideration, then, of the status of the person, it is mainly, though not exclusively, the capacity to act in the exercise of rights with which we shall be concerned.

Even at the present time there is a difference between man and man in the capacity to have certain rights. This

difference, however, does not arise from the denial to some men of the same measure of freedom as is conceded to others. It arises purely from the nature of political organization. Within the state, as the sphere of right or law, no one can exist without his having rights. But it does not follow that all who stand within the sphere of right, or, in other words, who are members of the state, must in fact have the same rights. It does not even follow that they must all have the same jural capacity. The actual possession of rights in the case of any person depends on the particular relations of right or law in which the person happens to stand. There are many relations of right in which any member of the state may stand; but there are some in which the person can stand only because the sovereign authority of the state sees fit for its own ends to set him in those relations.

One's capacity to have rights is determined by the public will, and by the public will alone. That is to say, one's capacity to have rights is determined by the organized will of the community as that will is embodied in custom and in the enactments of the legislature. Whatever principle underlies the constitution of the state, that principle is necessarily affirmed or expressed by the public will in determining the capacity of members of the state to have rights. If the constitution be a free constitution, founded on the principle that all men, in virtue of their rational nature, are entitled to live self-determined lives, then the primary affirmation is the equality of all members of the state as such. This involves an equal capacity in all to have all the particular rights which may arise out of the ordinary jural relations. By the ordinary jural relations is here meant such jural relations as can be formed independently of any creative or constitutive act of the sovereign authority. But the primary affirmation

of equal capacity is quite consistent with the bestowal of preferment on some members of the state for public ends. This bestowal of preferment involves the creation of special jural relations.[1] The capacity to have rights thus admits of a distinction into a general capacity and a special capacity. The mere fact that A, B, and C are, each of them, members of the state, grounds in all of them certain rights which are the same for all members of the state. These rights only await occasion to emerge in the case of A, to the same effect as in the case of B or of C. The jural capacity which A, B, and C and all other members of the state thus have in common may appropriately be called their general status. But over and above this general status, any person, who is not disqualified by nonage, or by some other cause defined by law, may come to have rights of an exceptional kind, such rights being connected with the tenure of some office in the public service. Or again, any person, even if he be in nonage, may be the subject of exceptional rights which depend on his being a member of this or that corporation, just as a corporation itself, by virtue of its constitution, is the subject of such rights. The status thus conferred may be distinguished as special status.

What, now, is the will which determines one's capacity to act in the exercise of rights? It is the same will as that which determines one's capacity to have rights. It is the public will alone, as that will is expressed in law. Being the rational will of the community, the public will cannot be supposed to be prompted by arbitrary impulse, if, among those who are acknowledged to have rights, it makes distinctions as to their capacity to act in the

[1] Only those persons who are set in those relations can properly be said to have capacity for the particular rights arising out of the relations.

exercise of those rights. In making such distinctions the public will has regard to different conditions which are actually present among the different members of the state. The nature of such conditions calls for explanation.

There are certain peculiarities of constitution, certain qualities or accidents of the individual, which when they are present affect his status. These may be described as idiocratic conditions. In some cases they operate of necessity to limit the person's competence to act in the exercise of his rights. Whenever the will of any person is undeveloped, or feeble, or perverted, owing to the physical conditions of age or disease, that person's will is not, in fact, a free will, although it is of course potentially free. In proportion, then, as his will is not actually free, his jural capacity is limited, and of necessity limited, even at times to the point of complete extinction. Jural capacity is here viewed in that aspect of it which alone in modern law can be said to admit of degrees—the capacity, namely, to act in the exercise of rights. In other cases, again, idiocratic conditions operate to restrict the person's jural capacity, not because being present they must produce that result, but merely because they have been so determined as a matter of positive law. Physical differences or peculiarities may neither entail nor betoken mental defect. Wherever they do not, they cannot be accounted an ultimate or absolute test of superior or inferior fitness for having and exercising rights, though they may continue for long in the course of social evolution to be an element of difference in the measurement of individual status.

The status of individuals is affected in particular instances, not only by the presence of idiocratic conditions, but also by the relation of the individual to the jural

institution of the family. The family in its primary aspect is a natural group, and every individual is a member of such a natural group by the mere fact of his being born into the world. But the family is more than a natural group. In its second, and, for us at all events, its more important aspect, it is an institution of right or law. That is to say, it is a group juridically determined, or determined by law, on the basis of a natural group. As constituted through marriage, the family is constituted on a basis of law. As thus constituted, it is not necessarily identical in its scope or in its components with the natural group. The jural family, the family recognized by the law, may exclude some individuals who are included in the natural group. Thus it excludes those whom our law describes as natural children or bastards. On the other hand, the jural family may include some individuals who are strangers to the natural group which happens to be particularly in question. Thus it may include those who are known as relatives by affinity, though not by blood.

In respect, then, of each of these two species of conditions, idiocratic and relational, which may operate in the case of any individual, the gradation of capacity to act in the exercise of rights is seen to be inevitable as among those who stand in the sphere of right or are members of the state.

The broad contrast between general status and special status gives rise at once to what for the lawyers is the primary division of persons. This division is into private persons and public persons. In the classification of persons there are two bases of division to be especially considered —the juridical and the natural. It is on the juridical basis of division that persons are distinguished as either private or public. Subject, then, to the explanations already given as to general and special status, the difference

between a private person and a public person may be thus set forth: A private person whose status or jural capacity rests on conditions that apply to all members of the state alike, under the system of positive law established within the state of which the person is a member.

A public person, on the other hand, is a person whose status as a private person is qualified or modified by some preferment derived in the particular case from the will of the sovereign authority of the state. It is immaterial whether the preferment be derived directly or indirectly from the sovereign authority, provided it be really derived from that source, as, for instance, an office in the public service under one of the Local Government Acts.

Each of the two classes into which persons fall when the basis of division is juridical, is further divided into two sub-classes when the basis of division is natural. Every person is the centre of a definite bundle or collection of rights and duties. The extent of this collection depends, in the particular case, on the number and also on the complexity of the jural relations in which the person is implicated. The sum total of a person's rights and duties is called a *universitas juris*, or a *universum jus*. A person, then, who is described as the centre of a *universitas juris*, or as the subject of a certain totality of rights and duties, must of course have a natural existence. In other words, there must be a physical basis for the juridical existence of a person. The actual existence of human beings is the natural basis of the existence of a person. The physical unit which is juridically determined as a person, may be either a human being or a group of human beings.

The physical unit, therefore, is either simple or com-

posite. In accordance with this distinction, persons are classified on the natural basis, as individual and collective. Taking both the juridical and the natural ground of division into account, persons may be classified thus: Individual private persons; collective private persons; individual public persons; collective public persons.

*Definitions.*—An individual private person may be thus defined: A human being viewed as a member of the state, and as possessing that jural capacity which depends only on membership of the state.

A collective private person may be thus defined: A number of persons viewed as one person, in respect of their carrying on business in common, and viewed as possessing so much of that jural capacity which depends only on membership of the state as is implied in all possible relations between a company and any other person, when the company is constituted simply through the wills and for the profit of those who compose it. The firm of an ordinary trade partnership in Scotland answers to this definition.

An individual public person may be thus defined: A human being viewed, not simply as a member of the state, but also as the subject of some preferment derived from the will of the sovereign authority, and viewed as possessing such a jural capacity as depends, not simply on membership of the state, but also on the tenure of some office in the public service. An official of the government, whether of the central government or of any department of local government, answers to this definition.

A collective public person may be thus defined: A number of persons viewed as one person, in respect of their being, otherwise than simply through their own wills, associated for some end conducive to the public

advantage, whether conducive to their own profit or not, and viewed as possessing such a jural capacity, not simply as is implied in all possible relations between a company and any other person, when the company is an ordinary partnership, but also as depends on some preferment derived from the will of the sovereign authority. A corporation answers to this definition.

II. GENERAL STATUS.—The general status of a person is based on the very constitution of the state itself, as that constitution subsists at a given time. It is not based on any exercise of the will of the sovereign authority in reference to the person in question. But although the general status of a person involves no privilege, no immunity from the ordinary rules of law, and grounds itself purely on the principles of reason which are embodied in the actual constitution of the state, the will of the sovereign authority has a regulative function in respect of general status. In other words, when positive antagonisms develop through particular assertions of right, made in reliance on the general status of different persons, the intervention of government through the legislature, the executive or the judiciary, is required to adjust the relations of persons to persons.

1. Subjects: (*a*) Natural-born subjects.—Those whose status has so far been in question are, one and all of them, by hypothesis members of the body politic. They are those who, by reason of birth within the territory over which the sovereign authority extends, owe natural allegiance to that authority. In other words, they are, relatively to the governing power, subjects. The usual phrase to describe them is natural-born subjects. Under the provisions of various statutes, certain persons not actually born within British territory are held to be natural-born subjects. Thus all children are so held

who are born out of the British dominions, if their fathers at the time of such children's birth are natural-born subjects, free from attaint of high treason or felony, and not actually engaged in the service of any foreign prince or state at war with Britain (see sec. 1 of the British Nationality Act, 1730). The statute, however, does not apply to children born illegitimate, where the law of the country of their birth excludes legitimation by the subsequent marriage of the parents (Sheddon *v.* Patrick, 1854, 1 Macq. 535). So, too, all persons are held natural-born British subjects if in virtue of the foregoing enactment their fathers are held to be natural-born subjects (see sec. 1 of the British Nationality Act, 1772; *cf.* Dundas *v.* Dundas, 1839, 2 D. 31). Persons who are not, either at common law or by force of statute, natural-born British subjects, may become British subjects by the process of naturalization, as it is called; or, in the case of foreign women who marry British subjects, by the mere fact of marriage (sec. 10 of the Naturalization Act, 1870). As will presently appear, it is only within the last quarter of a century that any person not a natural-born British subject has been accounted capable of attaining the full status of a British subject. It is only within the same period, and in virtue of the same Act of Parliament, that a natural-born British subject has been enabled to renounce his allegiance without the consent of the sovereign.

(*b*) Aliens.—From the point of view of any state, all persons who are not subjects of the state are aliens. Subject and alien are thus correlative terms. The latter imports the absence of those characteristics which we have seen to be denoted by the former. The distinction comes to be of practical consequence, when an alien enters the territory of the state in relation to which he is an alien, or when, remaining outside the territory, he

is so circumstanced that, were he a subject resident abroad, he would have certain rights which by the law of the particular state an alien may or may not have.

Apart altogether from international considerations, no civilized state can possibly regard aliens within its territory as outlaws. From very self-respect it must recognize them as subjects of rights, though motives of public policy may dictate in their case limitations of status as compared with the general status of those who are not aliens but subjects. Further, the state must afford aliens protection in those rights. In return it is entitled to exact from them, during their presence within its territory, such loyalty or fealty as is implied in their obeying the laws and in their doing nothing injurious to the proper interests of the state.

The external relations of a state at a particular time may affect its attitude with regard to foreign immigrants, and may lead it to lay disabilities on aliens which are apt to subsist long after the occasion for their enactment has passed. One of the results of the French Revolution was seen in the adoption by this country of stringent measures in reference to aliens, which continued in force a considerable time after the need for them had ceased, if there ever really were such need.

In proportion as a state is conscious of strength its treatment of aliens tends to become more liberal. Great Britain, for example, not only allows aliens to carry on trade with the same freedom as if they were subjects of the realm, and not only allows them full rights of property in movables, including the right of action for personal debts and the right of disposing of their movable property by testament; but since 1870 it puts them in exactly the same position as natural-born British subjects with regard to acquiring holding, alienating *inter vivos*, and transmitting *mortis causa* heritable property as well.

An alien enemy is a person who owes allegiance to a state at war with this country, say. During the continuance of the war, such a person cannot, otherwise than under royal licence specially granted to him, bring in our Courts an action for recovery of a debt due to him. His assignee comes under the same rule. But the right that originated before the war began is not lost. It is only interrupted or held over until peace has been restored.

Neither a friendly nor a hostile alien has capacity for any right that falls within the description of public right within the state. Thus in this country he cannot be a peer, nor a member of parliament, nor the holder of any office of trust. Nor can he exercise the franchise in connection with any of our representative institutions. The question has been raised (Bartlett, 1876, 3 Couper's Justiciary Reports, 357) but not settled whether an alien is liable or competent to serve on a jury in a criminal trial.

On principle it is difficult to see how an affirmative decision on the point can be reached.

2. Denization.—There were two ways in which in this country previously to 1844 an alien might cease to be such. He might obtain letters patent of the Crown, constituting him a denizen. The status thus conferred enabled him to purchase and to transmit lands. But it did not enable him to take by inheritance; nor did it render him competent to hold political trusts; nor did it free him entirely from burdens to which aliens were liable. An alien might be naturalized by Act of Parliament to much the same effect as if he had obtained letters of denization. The status conferred was rather better than that of a denizen. In particular, it enabled the person naturalized to take by inheritance, but it did not qualify him to hold any political trust.

3. Naturalization.—By the Act 7 & 8 Vict. c. 66, passed

in 1844, power was given to a Secretary of State to confer all the rights and capacities of a natural-born subject on an alien who might petition for naturalization, except those of becoming a member of the Privy Council or of either Houses of Parliament. The Naturalization Act, 1870, not only gave increased facilities to an alien to become a British subject, but it gave equal facilities to a British subject to renounce his allegiance. Under this statute an alien who, after five years' residence in the United Kingdom, or five years' service of the Crown, intends, if he be naturalized, to continue his residence or his service, may apply to one of the principal Secretaries of State for a certificate of naturalization. On obtaining this certificate he becomes vested with all the political rights and powers of a British subject, and incurs all the responsibilities of a subject; under this proviso, that within the limits of the state to which he formerly belonged he shall not be deemed a British subject unless he have ceased to be a subject of that state in pursuance of its laws or of a treaty to that effect. On the other hand, a British subject naturalized in any foreign state is deemed to have ceased to be a British subject and is regarded as an alien. He may, of course, be restored to the character of a British subject. But he can be so restored only on the same terms as those on which other aliens are admitted. Immediately after the passing of this Act, a Convention as to naturalization was signed between Great Britain and the United States; under the Convention, subjects of either state may be naturalized in the other according to that other's laws. They thereby cease to have their old national status. They may go back to their former allegiance. But they can do so only on the terms which apply to other aliens. On these terms they may change back and forward repeatedly.

## CHAPTER IX

### FIRMS AND COMPANIES

ENGLISH law, differing in this respect from the law of Scotland, does not recognize the firm of a private partnership as possessed of a separate *persona*. Since 1876, it is true, it has been competent in England for an action to be brought by and against partners in the name of their firm. But this change of practice does not seem to have made any change on the old doctrine of English law, which refuses to recognize the firm as a separate person. English law is nevertheless familiar enough with the distinction between the *persona* of a collective body as such, and the *persona* of each of the members of the body. When the collective body is a corporation, constituted by Royal Charter, or by Act of Parliament, or by registration under the Companies Acts, the separate *persona* of the Corporation is recognized in England to the same effect as fully as it is in Scotland. For the most part, however, English lawyers speak of the *persona* of a corporation as a fiction of law, while they seem to shrink from so describing the *persona* of an individual human being.

But if the *persona* of a corporation be a *fictio juris*, why is not also that of an individual human being to be so held? In the latter case, it is true, the unity which is represented by the person is a physical unity—a man, a woman, or a child. The person may, therefore, be thought of as real, in the

sense of its existing in connection or assumed identity with a being that is physically one. In the former case, where a collective body is in question, the unity which is represented by the person is not a physical unity. It is an ideal unity which, whatever more may have to be said of it, is the sum of so many individuals or groups of individuals. The person may therefore be thought of as fictitious in the sense of its not existing in connection or assumed identity with a being that is physically one. The person of a corporation and the person of an individual human being are the same in respect of juridical basis, different as they are in respect of physical basis. If the one is to be treated as a legal fiction, the other must be treated as a legal fiction too. In both cases the person is in truth purely a juridical creation. But this is not to say that it is a legal fiction in the sense of its having no real existence. It has a real existence within the sphere of right. The individual is a person not in the full enumeration of his qualities as a human being, but only in so far as he is the embodiment of a free will and is therefore a member of the state. In like manner a corporation is a person, not in respect of its size, not in respect of its particular constituents, not in respect of its particular object, not even in respect of the sum total of its attributes as a group of human beings, but only in respect of the will which it embodies and puts forth. The will of a corporation is the will of its members, viewed, not as so many individuals each with an independent will, but as members of an organized body that exists for some definite object, in order to the realization of which the otherwise independent and possibly antagonistic wills of the members are determined into coherence and ultimate identity.

It does not follow that every union of individuals, based on a community of their wills in respect of some specific end, is by the mere fact of such union a person. It depends

entirely on what may be called the particular or contingent element in positive law, as distinguished from what comes to be determined by necessity or reason, whether or not a union of the private partnership type has a separate *persona* from the individuals who are members of the union. The question why an ordinary partnership may by the law of one country have a separate *persona* and by the law of another country may not have it, can be answered in this way. If, in relation to one another in the company, the individual members have only such rights, and are under only such liabilities as, apart from membership of the company, they may have, or be under, in relation to third parties who are not members of the company; if, to put the matter otherwise, the basis of the company be purely consensual, so that the rights and the liabilities of the individual members are governed wholly by the law of contract, then, while it may be convenient, it is not at all necessary for the law to recognize the company as possessed of a distinct and separate *persona.*

The same conclusion holds in regard to the external relations of the company—the relations, that is to say, of the co-partners, as such, to third parties. Where the basis of the company is purely consensual, the co-partners, whether as creditors or as debtors, can deal with third parties and be dealt with by them to the same effect under one system of law as the company itself, regarded as a distinct person, can, under a different system of law, and subject to a different legal machinery, deal or be dealt with. The positive law, therefore, of different countries, and even the law of one country at different times, may determine differently as to whether the firm of a private partnership is a person apart from the persons of whom the firm is composed.

Though the law of Scotland recognizes the separate

*persona* of a firm, and sanctions the logical consequences, it yet to some extent sanctions also, by way of alternative, the logical consequences of ignoring or denying the separate *persona* of a firm. Thus, immediately after declaring that in Scotland a firm is a legal person distinct from the partners of whom it is composed, the Partnership Act adds —"but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro rata* from the firm and its other partners." Such a proviso takes for granted the absence of any necessity in the notion of a firm for the firm's being recognized by law as a distinct person.

The proviso is inapplicable where a public company or a corporation is in question, because there is necessity in the notion of a corporation for the corporation's being recognized by law as a distinct person. In relation to one another, and also in relation to third parties, the members of a corporation have certain rights and liabilities which originate not in contract but in the constitution of the corporation. The constitution of the corporation, even if in some measure it represent an initial agreement of wills among the members, is always determined and upheld by the power of a will that is over and above the wills of the members, that is, over and above even their organized wills. This supereminent will is of course the public will as exercised by the sovereign authority. Whenever a definite group of persons has rights and liabilities which owe their validity to the special sanction by the public will of the constitution of the group, that group, both in relation to its members and in relation to third parties, is bound to be thought of and treated as a distinct and separate person.

Take, for example, the case of a company, like a railway company or a banking company, vested, as a matter of public policy and in virtue of public authority, with mono-

poly privileges. Here, because the essential element in the constitution of the company neither originates in consent of the members nor subsists through such consent, the relations of the shareholders as such to one another and also to third parties are all mediated by their relation to the company as a company. The company stands out as a unit against the units of which it is itself composed. Equally it stands out as a unit against other similar units not its own constituents. But the company unit as thus described, is a person by reason of its capacity to have rights and to put forth will. An abstract person it is indeed, in this view of it. Nevertheless it is a person, which ceases to be abstract the moment it becomes in the process of realizing its capacity, involved in relations of right with other units, individual or corporate, having the like capacity.

A corporation is a body of persons constituted under a particular name by the sovereign authority for some purpose conducive to the public advantage, having, as so constituted, a continuous identity throughout whatever changes may in the course of time occur in the membership of the body; having, as a unit subsisting in the sphere of right, and in respect of every relation with other persons into which such a collective unit can possibly enter, the jural capacity which is common to all members of the state as such; and having further, as expression of the will put forth in its creation and endowment, a jural capacity conditioned by the special end which the body is formed with a view to serve.

# CHAPTER X

## PROPERTY

I. POSSESSION.—1. Natural and Civil. 2. Immovable and movable.
II. USE.
III. OWNERSHIP.—1. Physical seizure. 2. Formation. 3. Designation.
IV. PRESCRIPTION.—Positive and negative.
V. ALIENATION.

PROPERTY is the embodiment in an outward object of the free will of a person. These two elements are involved in the notion of property: on the one hand, the will of a person; and, on the other hand, an outward object or a thing. Viewed separately, the will and the thing are the abstract elements of the notion; viewed in union, they are the true concrete or substance of property.

A person, then, is a being who is self-conscious; who, as self-conscious, is self-determined; who, as self-determined, stands in the sphere of right; and who, as standing in the sphere of right, or, in other words, as a member of the state, has a capacity to have rights, and a capacity to act in the exercise of rights. A thing, for its part, is the very opposite of a person in all the particulars thus enumerated; it is not self-conscious; it is not self-determined; it does not stand of itself in the sphere of right; and it has no capacity for rights. Be it the earth, or be it any product of the earth, or be it any commodity made from these, a thing is a thing because of its being a mere instrument

to the satisfaction of men's needs, and altogether or unreservedly at men's disposal.

The will of a person, in virtue of which the person is a person, may of course be considered simply as such, or apart from any object. So considered, the will is abstract, and the person is abstract. But the will, the person, cannot continue to be abstract. It is of the very essence of will to be active, and to manifest its activity. It lies in the very nature of will to realize itself, to embody itself in something that is not itself. Will, in other words, goes out, or is put forth, in necessary reference to some object or thing. The object being in itself devoid of will, admits of the passing into it of the will of a person. When this happens, the person, in effect, grasps the thing. The thing ceases to be a mere thing. At the same moment the will of the person ceases to be a mere abstract will. The thing is no longer just an outward object, an object external to the will. By its having been taken up into the life of the person, it has lost its absolute or abstract outwardness. The union, then, of will and thing, as thus brought about, constitutes the notion of property.

Since the free will of a person manifests itself only in the sphere of right, property is an institution of right, and is of necessity such. In order, therefore, that the private will of anyone may unite itself to a thing, so as to convert the thing into property, the private will must be put forth, as regards the object, in accordance with the recognized standard of right. The private will, that is to say, must be exercised under the sanction of the public will.

In the case, comparatively rare in any advanced state of society, of a thing which either has never as yet had the character of property, or, having once had an owner, has become through abandonment a *res nullius*, the mere

act of physical seizure on the part of any person is all that is needed to make the thing juridically that person's own. There is no other person's will in question. There is therefore no possibility of collision or difference between the private will of one person and that of another. In the case supposed, then, possession and property are not to be distinguished from each other; or, if they are to be distinguished, they are to be distinguished only as inward and outward, or as substance and form. To have or to hold, to grasp or to grip, to occupy or to possess a thing, is, in the case supposed, to own it or to be the proprietor of it.

In the case, again, of a thing which has once been appropriated; as long as the will that was first put into it has not been withdrawn, any act of physical seizure on the part of another person cannot be thought of otherwise than as an infringement of that right which has already been established in the person of the original holder of the thing. By hypothesis the first act of seizure was effective to convert the thing into property. Now, because property is an institution of right, the second act of seizure, which may be expressive perhaps of superior personal strength, plainly contradicts the right which accrued to the first holder of the thing in virtue of his act of seizure. Consequently the hold which the person second in question retains on the thing is without sanction of the public will. In other words, it is a wrong. Here, then, possession and property have ceased to be identical. Possession has to be qualified by the addition of some other element in order to be equivalent to the notion of property. This other element is the right in the possessor of exclusion as regards other persons. Such a right, obviously, being vested in the person who has first appropriated the thing, cannot co-exist in respect of the

same object in the person who has acquired actual possession by virtue of a subsequent act of appropriation.

Though separable in thought from possession, the right of exclusion, as involved along with possession in the notion of property, mediates the connection between possession and use. But before passing to an explanation of use, possession must be further considered.

I. POSSESSION: *Natural and Civil.*—The mere holding of a thing, so as *de facto* to exclude other persons from exercising any control over it, is not possession any more than it is property. In the notion of possession, as in that of property, the physical fact is only one element. The other element in both is will or purpose. It is possible to hold a thing without being aware of the fact. But whether one holds the thing knowingly or unknowingly, one does not possess the thing without willing or intending to hold it for oneself or for some one else. Apart from such purpose the holding of a thing is of no consequence in law. It is mere detention. To bring the physical fact named detention within the scope or the concern of law, there must, in addition to the fact, be what is called the *animus habendi*, or the intention to hold for a person, who may be either oneself or another. Where the *animus* is to hold for oneself alone the possession is such as is implied in the notion of property. It is commonly distinguished as proper possession, and it relates, not only to corporeal things, but also to incorporeal. There may seem to be an incongruity in speaking of possession with reference to incorporeal things. The Roman lawyers sought to remove the incongruity by prefixing to the term possession as applied to incorporeal things the qualifying word *quasi*. Proper possession, then, is not to be taken as equivalent to corporeal possession. Whether thought of in connection with a corporeal or an incorporeal thing,

proper possession is such as implies an *animus* to hold the thing for oneself exclusively.

The *animus*, however, may be to hold the thing not for oneself alone, but so far for oneself and so far for another person. The *animus* may even be to hold the thing not for oneself at all, but wholly for some one else. In either of these cases the notion of possession is in truth realized, and it is fully realized although it is not the kind or species of possession that enters into the notion of ownership. In respect of difference as to the persons to whom the *animus* refers, which is constitutive of the possession of a thing, different kinds of possession come to be recognized. The first kind of possession, distinguished on this ground, is that which is proper to the idea of ownership. The second kind is, where the *animus* is to hold partly for oneself and partly for some other person. A tenant's possession of lands, say, or of a house, affords illustration. The third and last kind is where the *animus* is to hold not for oneself at all, but wholly for some one else. A custodier's possession of a movable subject, like a jewel or a book, exemplifies this kind.

The character of the relation, as being a physically immediate relation or not, of the possessor to the thing possessed, is another ground of division. On this ground possession is divided into natural and civil. There is an objection to the names thus adopted, for they are apt to suggest a contrast between what is extra-jural and what is within the province of law.

All possession is civil in that meaning of the word which comes out, for example, in the phrase civil law. This is true at anyrate of all possession that can be described as just (the *justa possessio* of Roman law) in opposition to unjust (*injusta possessio*), such as that of a thief. But possession, natural and civil, is a time-honoured distinction,

too well established to be superseded, though it imports a narrower meaning of civil than is to be approved. According, then, to the distinction, natural possession is possession in which the possessor holds corporeally the thing possessed. Civil possession, on the other hand, is possession in which the possessor holds the thing possessed, either by the mere exercise of will, without his actually being in touch with it, directly or through another person; or, by his being in touch with it through a person acting so far as his representative. Civil possession, though it may seem to have little or no reference to use, is nevertheless of great consequence in law. For one thing, it is quite as effective as natural possession to establish or to fortify, by prescription or otherwise, an imperfect and imperfectible claim to ownership.

The modern distinction between natural and civil possession is derived from the Roman law, but as seen, for instance, in Scots law, it is not quite the same.

With the Roman jurists the *animus possidendi* meant the intention of the holder of a thing to hold it as his own, and not for behoof of some one else, as, say, a pledgee held it. If a person held a thing physically, but, as in the case of a borrower, without the intention of holding it as his own, he was said not to possess the thing, but to be in possession of it (*in possessione esse*).[1] Natural possession, then, in the view of the Roman jurists, covered these two cases. It covered (1) the case in which a person was *in possessione*, and (2) the case in which a person, having indeed the *animus possidendi* as well as the actual hold of the thing, yet did not hold the thing *bonâ-fide* or *ex justa causa*. Civil possession, on the other hand, was that in which a person, holding the thing *animo possidendi*, held it also *bonâ-fide* and *ex justa causa*. Civil possession was protected by

[1] Non possidet, est tantum in possessione. D. 41, 2, 10; *cf.* Sandars.

interdicts, and it grounded prescription, or usucaption. Natural possession did not, in either of the cases covered by it, ground usucaption, and was protected by interdicts only in the case where the thing was held with the intention of ownership.[1]

In the law of Scotland the *animus possidendi* may be either for oneself or for another, or for both. In the absence of the *animus* there is in strictness no possession even where there is physical detention. Consequently in preserving the distinction between natural and civil possession the Scots lawyers have had to give a different meaning to the words from that which they bore in the Roman law.

As regards what are called the possessory remedies, such as interdict, actions of ejection, intrusion, removing, etc., and as regards also the positive prescription, natural and civil possession are, in the law of Scotland, on one and the same level.

The advantages which accrue to a possessor from the fact of possession fall under the two heads just now noticed—that, namely, of protection by means of possessory actions, and that of acquisition by prescription. These *commoda possessionis*, sometimes called *jura possessionis*, are benefits or rights which spring entirely or in the main from possession. The first of them is the right of the person who possesses a thing to repel any invasion or disturbance of his possession; this right entitles him, by process of law, to maintain possession when it is threatened, or to recover it when it is lost. The second of the rights is the right to acquire or secure property in what did not at the outset belong to the possessor. This right accrues to him by his holding the thing for a certain length of time on an adequate title.

The *jura possessionis* are consequences of possession.

[1] Sandars, p. 485.

They are therefore to be sharply contrasted with the *jus possidendi.* As intrinsically connected with ownership, and with some of what may be termed the inferior species of ownership, such as lease-hold, the *jus possidendi* may be antecedent to possession, though it must also, of course, co-exist with possession.

In possession, as in ownership, the admission of one person's right is the exclusion of every other person's right. *Possessio duorum in solidum* is impossible. This maxim of law, however, is compatible with two or more persons *pro indiviso.* It is compatible also with possession, natural or civil, by several persons holding, each of them, with a different *animus*; as, for example, fiar and liferenter, landlord and tenant, owner and custodier.

*Immovable and Movable.* — In the law of property much depends on the nature, as immovable or movable, of the outward object in possession. In most countries historical causes have operated to bring land, and whatever is attached to the land, under a different order of juridical treatment, from that applied to things which can move or be moved about from place to place. Whether such a difference is ineradicable or not may be open to dispute. Many, indeed, of the peculiarities of the law with regard to immovable property have their origin in political, economical, and other forces which are subject to a process of evolution. The modern tendency, therefore, to assimilate, for example, the rules of succession in land to those which govern succession in movables may go further in various directions than can yet be foreseen. Be this as it may, the nature of the outward thing in possession, as immovable or movable, has given rise to two broadly distinguished systems of positive law—that which relates to territorial property and that which relates to movables. The special influences which serve

to shape the history of nations have told to the effect of determining the law of property in land into difference from the law of property in movables. The same influences have told also to the effect of determining the law of territorial property in one country into difference from the territorial law of another country.

II. USE.—When a person has put his will into a thing, so as to hold it for his own, his will has been motived or drawn out by desire. Satisfaction of the desire depends on the existence of the thing, and on the person's possession of the thing. In some way or other the thing has to be put to use, in order to the realizing of the desire. Use consists in doing something either to a thing or with a thing. Use which consists in doing something to a thing is by way, for instance, of altering, destroying, or consuming the thing. Use which consists, on the other hand, in doing something with a thing, is by way, for instance, of applying, exhibiting, exchanging or otherwise alienating the thing.

As depending on possession, use, like possession itself, is exclusive in reference to other persons than the possessor. As depending on the subjection of a thing, in its own nature devoid of will, to the will of a person, use is absolute. But although theoretically use is thus exclusive and absolute, practically it is limited in both of its aspects. The restrictive conditions affecting it originate in the existence of the social organization implied in the existence of the state. The public interest may demand interference with the private owner's exclusive or absolute use of what belongs to him. Wherever the public interest makes such a demand, the private owner's use of his property is by operation of law broken in on, or laid under restraint, to the extent of the demand. Even where the public interest is not immediately concerned, the interest

of some private person, other than the owner himself, may require an owner's exclusive or absolute use of his property to be more or less restricted. Where this is so, the restraint depends on agreement or contract. Consideration of the various conditions which import interference with the use of property enters deeply into the law of every civilized country, and therefore into jurisprudence.

Use, it has to be noted, is further conditioned by the nature of the outward object in possession. An immovable thing, like land or a house, is capable of ministering to the wants of a person—that is to say, is capable of use—in ways that a movable thing, like a picture, say, or a horse, is not. Contrariwise, a movable thing, as movable, has uses, or possibilities of use, which immovable property, simply because of its being immovable, has not.

III. OWNERSHIP.—Ownership, again, originates in appropriation or occupancy under sanction of the public will.

The act of appropriation must necessarily be manifest. Otherwise it would not be valid as against a similar act of appropriation on the part of any other person. Difference in the mode of making the act of appropriation manifest turns on many conditions. These conditions may be connected either with the nature of the object, or with the special abilities of the person. The various modes of manifesting appropriation are the various modes of the creation of property. They may be reduced under three main heads: (1) physical seizure; (2) formation; and (3) designation.

1. *Physical Seizure.*—This is the kind of appropriation which has hitherto been held in view. Further it need only be borne in mind that there are natural limitations of physical seizure, as well as extensions of such seizure by inference to what is in connection with the amount actually seized, and extensions by artificial means. As regards the

limitations, they relate to what, from the nature of the substance, or from any other cause, remains insusceptible of being laid hold of at all. They relate further to what admits of being laid hold of, but under certain conditions as to amount and so forth. They relate also to the time during which it is possible for the grasp to be maintained. As regards the extensions, on the other hand, mention may be made, by way of illustration, of such things connected with property in land, as rivers, lakes, rocks, minerals, alluvial deposits, and the like.

2. *Formation.*—This may be roughly explained as the giving of shape or form to a thing. Examples of it are the cultivation of the soil, the planting of trees, the raising of cattle, the manufacturing of goods. As regards manufactures, where the materials are not the property of anyone else than the manufacturer, and especially where they have not hitherto been the property of anyone, the effect of formation is plain in the creating of property, or, at all events, in the manifesting of the act of appropriation more completely and more permanently than where there is merely physical seizure.

In cases where, by the act of one person, a new subject or species is formed from materials belonging to some one else, as flour from corn, wine from grapes, or the like, the operation is called specification by modern text-writers, following the commentators on the Roman law. Where the new species can be brought back to the matter of which it was made, as plate into bullion, the original material is held still to exist. The property therefore may be claimed by the owner of the material, subject to a claim against him in *quantum lucratus* by the workman. On the other hand, where the substance is completely changed, so that it can never be brought back to the state in which it previously existed, as when bread has been

made from corn and wine from grapes, the property belongs to the workman, under burden of his paying the value of the materials. These rules have been adopted, in our law, from Justinian's settlement of a controversy that had divided earlier Roman jurists into two hostile camps.[1] The same rules apply for the commixtion of different substances belonging to different owners. It is hardly necessary to say that the rules apply only in the absence of any relation of contract between the parties in respect of the particular subject-matter. In cases where two substances are mixed without the consent of the owners, the operation is called commixtion, or, in the case of liquids, more specifically confusion. If things of the same sort be mixed and admit of being separated—for example, two heads of cattle or two flocks of sheep—the property remains distinct. If, however, the things, once they are mixed, cannot be separated again, as in the case, say, of two casks of wine, the whole becomes common property. In the division of the price, the different qualities of the wines, if there were any such difference before the blend was made, must be taken into account.

Besides specification and commixtion there is a third way in which two different substances may be united to or connected with each other, so as to bring them under the rule *accessorium sequitur principale.* This third way is named by the commentators adjunction. It is illustrated by the case of one person's having woven into his own vestment, purple belonging to another person. The purple may have been so woven in as to admit of its being again separated, or it may have been made an inseparable part of the fabric. Cases of adjunction, of which this is only an example, are governed by the following rules, when

[1] Just. 21, 34. *Cf.* D. vi. 1, 23, 3, where Paul expresses a contrary opinion.

the question of principal and accessory has to be settled: (1) where one of the substances is capable of existing independently but the other is not, the former is principal, the latter accessory; (2) where both are capable of existing independently, the one which the other serves to complete or ornament, is the principal; (3) where neither of these criteria can be applied, that substance which is of the greater bulk, or, if this criterion cannot be applied, then that substance which is of the greater value, is the principal. In all the cases thus distinguished, as well as in those already considered under the heads of specification and commixtion, wherever the substances that exist in union are incapable of being again separated, the property of the whole belongs, in virtue of formation, to the owner of the principal; he to whom the accessory belonged having a claim to be indemnified.

3. *Designation.*—This mode of the creation of property consists in the employment of a sign to indicate the act of appropriation. Occupancy, by means of designation, has been described as the most perfect of all, for the other kinds of occupancy are also more or less of the nature of a sign. When I seize a thing, or form a thing, the ultimate import of what I do is always a sign that, to the exclusion of others, I have set my will in the thing. The notion of a sign is this, namely, that a thing does not stand for what it is, but for what it signifies.

There is little within the bounds of a country like ours that is ownerless, either in the sense of its never having had an owner, or in the sense of its having once had an owner, but of its now having none. Consequently designation, like physical seizure and formation, is rather to be thought of, so far as modern experience goes, as the exhibition of a derivative title to property, than as a mode of original acquisition. The illustration

of occupancy most familiar to people in this country as falling still, every now and then, within the range of their national interest, is the appropriation by the sovereign authority of new territory abroad; as in the case, it may be, of a newly discovered island, or, notably of late, in the partition of immense tracts in the continent of Africa. The running up of the Union Jack is designation effectual to mark a territory as a British possession; though, of course, the connection which has been shown to exist between possession and use, renders the discharge of administrative and other functions on the part of our government necessary to preserve the right established by occupancy.

Neither in the case of a nation, nor in that of an individual, does mere discovery afford a good title. There must besides be settlement or seizure, although—especially in the case of a nation—the act of appropriation does not need to be immediate, provided that notification be made to other nations of intention to appropriate, and provided also that effect be given to this avowed intention within a reasonable time.

As original occupancy, whether in the case of land or of movables, gives rise to no distinction between possession and property—as to possess is then to own; as the *animus habendi* manifested under sanction of the public will by the act of appropriation is all that is required to convert a thing instantly into property—it follows that, for as long as the first appropriator continues to possess and use the thing, his *jus possidendi*—his right or title to possess—is beyond controversy. His title is not separate from his possession, but is involved in his possession. The withdrawal of his will from the outward object puts an end to his possession, and, apart from other institutions and sanctions of law, which for the moment may be left out of sight, throws the thing back into the condition of not being

property at all—into the condition of being, in other words, a *res nullius*—capable of being again made property by himself or by some one else in the same way as it was made property before. The owner, in the circumstances supposed, may withdraw his will from the thing during his lifetime by mere abandonment of his hold, or he may retain his hold till it is loosed by death. In either event the thing becomes a *res nullius*.

But the circumstances supposed are not those of any country peopled under the most elementary conditions of civilization. Even when the institutions of law are at a very early stage of growth, ownership or property implies, among the specific rights into which it can be analyzed, the *jus disponendi*, or right of alienation, by some act, *inter vivos* at least; and the event of an owner's death is provided for by some law of succession. Hence in any settled state of society a thing that has once become property seldom ceases to be property, seldom becomes a *res nullius*. For, simultaneously with the withdrawal of the will of one person from the object in possession, there is, in the general case, a passing into the object of the will of another person, so as to operate a transfer, and avoid an extinction of possession and property. The transfer, indeed, may be, not, as has just now been taken for granted, of possession and ownership together. It may be of possession, and not at the same time of ownership. Or it may be of ownership, and not at the same time of possession. This is tantamount to saying that the *animus alienandi* may extend either to the whole of what in any particular instance is included in the notion of property, or to a part of that whole. Thus, original occupancy being by supposition at an end, the title to possession of the thing is no longer involved in possession, as in original occupancy it was. The title stands out as separable from

possession, even when, as a matter of fact, it is present with it. The title, then, in every case that is not one of first appropriation, is the right, derived from a previous owner of a thing, to natural or civil possession of the thing.

The right may be so derived, either by virtue of an act of alienation on the part of the previous owner, or by operation of law in the event of his having died without his having exercised the *jus disponendi.*

Now, many cases can be figured of possession on a title, which, if the title alone were to be considered as constitutive of property or ownership, would expose possession to disturbance, on the ground of the existence of a title preferable in law to that vested in the possessor. For example, a previous owner may have sold or gifted the thing to one person, and afterwards sold or gifted the same thing to a different person. By hypothesis the title thus held by the one disponee is, in point of form, precisely the same as that held by the other. But there is obvious reason for preference by the law of the first of the two grants, because in making that grant, the disponer left himself, in truth, denuded of any further *jus disponendi* in respect of the thing. Suppose, however, that the first disponee took no steps in due course to enter into possession, and that the second disponee, ignorant perhaps of the prior transaction, did, under the conveyance to him, take possession, it is clearly in the interest of the state, and in accordance with substantial right, that the second disponee, having possessed for a length of time by virtue of a title, on the face of it good, should not be liable to be ousted, in consequence of the production by the first disponee of a title of earlier date, which yet has never in the interval been asserted in competition with that of the second disponee. Security of possession is the primary condition of such use of the thing

by the possessor of it as is most conducive to the public advantage. Were there no limit to the time within which the title to ownership could be successfully challenged, on the ground of a better title in the person of some one else than the possessor of the thing, there would be a practical stumbling-block of the most injurious kind to industry and enterprise.

IV. PRESCRIPTION.—*Positive and Negative.*—These considerations are found to have influenced positive law from a very early period of history. The first traces of their effect are discovered in the customary recognition of possession for time immemorial, without other evidence of title, as conclusive of ownership. A title, in the sense of a right derived from some previous owner, is tacitly assumed to have existed, but to have been lost. Or, more likely, the original owner is assumed to have withdrawn his will from the thing, and thus to have left it a *res nullius*, so that, as regards the present possessor, no distinction is set up between possession and ownership.

On the first of these assumptions, the mere lapse of time, during which no one asserting an adverse title has come forward, is held as proof either that no such adverse title has ever existed, or that the person who might have profited by it has abandoned his claim. On the second of the assumptions, the mere lapse of time, during which the previous owner has done nothing to show that he still wills the thing to be his, is held as proof that he has withdrawn his will from the thing, or, in other words, has abandoned his property in the thing. On either of these assumptions, a possible competitor with the present possessor for the ownership of the thing loses, by the mere lapse of time, the right which at an earlier date he might have vindicated or made good; while the present possessor, for his part, and against such a possible competitor, gains by the same

lapse of time recognition from the law of his continued possession as conclusive of ownership.

If the effect thus given by law to lapse of time be denoted by the word prescription, then, to adopt the nomenclature of a later period, prescription may be distinguished as positive and negative. It is positive in reference to the present possessor of the thing, because his possession, as having lasted for so long, is construed as definitive of his being proprietor. It is negative in reference to the person spoken of as a possible competitor with the present proprietor, because whatever claim that person may once have had is finally disallowed or extinguished, as having been sunk for so long.

Prescription, therefore, may be thus defined:—The effect given by the public will, as expressed in law, to the lapse of time in connection with possession, as establishing in one person the claim to be accounted owner of the thing possessed, and as putting an end in another person to an adverse claim.

Positive prescription and negative prescription are, in truth, just different sides of one and the same process. Except where one person's title to the ownership of a thing is liable to be challenged by some other person on the ground of the latter's having a better title, prescription is plainly out of the question. If, then, the running of time for so long be of effect in law to secure P's title to the property, it is necessarily of effect to extinguish Q's claim, whether that claim has ever, as a matter of fact, been put forward or not. From P's point of view the prescription is positive, from Q's it is negative. It is possible, however, to take either point of view and practically to sink consideration of the effect from the opposite point of view. Thus, if P has possessed uninterruptedly for such a length of time as to have become, by recognition of law, the proprietor of

the thing possessed, the positive effect as regards P tends to be thought of alone, more especially as no person has meanwhile appeared to dispute the ownership of the thing, and, in respect of the lapse of time, to have his claim explicitly negatived.

On the other hand, if Q seeks to press an adverse and in itself preferable claim, P's plea of prescription turns attention on the effect of time in extinguishing or negativing Q's claim, rather than on the positive effect of time as regards P's originally defective or imperfect title. Of course, the two aspects of prescription are intrinsically so connected with each other as to be really inseparable. But by as much as either of them is the more prominent in a given case, the other falls, so to say, into the background. Practically the distinction between positive prescription and negative has worked itself out in law into a broad difference with respect to object.

So far, time immemorial as the period of prescription has been instanced. Such a vague measurement of time for a jural purpose is in keeping with other characteristics of primitive peoples. But it must soon give way to the enactment of more definite rules. Accordingly we find in Roman law an early advance by legislation to the fixing of a certain time, on the expiry of which time possession in good faith was held conclusive of property. The time fixed at first was short. This fact may be explained on the ground of two different considerations. In the first place, there was comparatively little intercourse with countries abroad, such as might have rendered the prompt assertion of an adverse title a matter of difficulty. In the second place, had the prescriptive period been a long one, the possessor in good faith might in the course of it have been converted into a possessor in bad faith. The possessor in good faith was he alone in whose favour

the prescription was introduced, and he would have been converted into a possessor in bad faith by his discovery of a better title in some one else.

With the inevitable change from the social conditions of their earlier history, the Romans were led to lengthen the prescriptive period. The *praescriptio longissimi temporis*, as they called it, extended in the ordinary case to thirty years, and in the case of church lands to forty years.[1] In application to property—that is to say, as positive prescription in distinction from the corresponding negative prescription which applied to actions—the *praescriptio longissimi temporis* demanded *bonâ fides* on the part of the possessor, at all events when his possession began. But the prescription does not seem to have required a *titulus* or title, in the full sense of that word. In both of these respects the positive prescription of Scots law differs from the Roman.

V. ALIENATION. — That withdrawal of will from a thing, or that inactivity of will in respect of a competing claim, which always enters more or less obviously into the notion of prescription, is one mode of the alienation of property. Here the alienation is implied, not express. It is to be inferred from the prolonged omission to make any use of the thing, or from the continued failure to assert a claim to make such use. The alienation is not manifested by any act of direct disposal of the thing to or in favour of another person. Even, however, in the early stages of the history of law, the alienation of property is for the most part express. When the alienation of property is express, it is the result of an act of will on the part of the proprietor, and at the same time of an act of will on the part of another person. These two acts of will are identical as to their subject-matter. They are

[1] Nov. iii., changing C. 23, 1, 2, where 100 years prescribed.

identical also as to their aim. Together they determine the thing to pass from the one person to the other as that other person's property. Together they determine the thing to be henceforth the embodiment of the transferee's will, and to be no longer an embodiment of the will which was previously set in it,—of that will which, in one aspect of the act of transfer, has now been withdrawn from the thing. Wherever identity, community, substantial concurrence, is found between the wills of different persons, in respect of the disposal of the thing by transfer, the alienation of property is brought under the idea of contract.

## CHAPTER XI

### SUCCESSION—DISPOSITION

I. SUCCESSION.—The law of succession has come to be more or less closely connected with the idea of an alienation of property. Succession *ab intestato* has come to be regarded as such an alienation, necessitated, indeed, by the death of the owner of the property, but determined *ipso jure* as to the person brought in the character of transferee into the place of the deceased. So, too, succession *ex testamento* has come to be regarded as an alienation of property, necessitated in the same way, but determined by the will of the deceased as to the person substituted for him in the ownership of the property. But the ancient law of intestate succession, out of which the modern law has sprung, involved no thought of the alienation of property. Even testamentary succession, although, in its origin among the Romans, an act of alienation as between individuals, had not the alienation of property for its real object or end.

The Roman family was a corporation, continuing to exist independently of the life of any of the individual human beings who were members of it. The death, therefore, of the *paterfamilias* was in point of law an event of no moment whatever. F, say, was substituted for P as representative of the collective body, and as primarily amenable to municipal jurisdiction. But this change of

the domestic chief was practically just the change of name, and made no difference in the jural position. Without break in the continuity of their existence all the rights and all the liabilities of the dead *paterfamilias* rested in the man who came in his place. They were the rights and the liabilities of the family; and the family as a corporation never died. Creditors, accordingly, had the same remedies against the new *paterfamilias* as they had previously had against the deceased. Debtors were as much bound as before, and could be sued for what they owed the corporation, though the corporation had to sue under a new name.

Exactly the same thing occurred when a person who was *sui juris* was adopted or abrogated into another family. His rights and his liabilities passed entire to the person who by the process of adoption became his *paterfamilias*.

All the rights and all the duties or liabilities of which a person is the centre can be thought of as a definite whole. This whole, quite intelligibly figured as a man's legal clothing, is what is meant by a *universitas juris*.

It is essential to the notion of a *universitas* that it should be capable of being as a whole devolved on some person or persons in substitution for the person who is at present the subject of those rights and duties in which the *universitas* consists. Such rights and duties, therefore, belonging to a person, as from the nature of their origin or otherwise are incapable of being at once transferred along with the rest to any other person, do not enter into the notion of a *universitas juris* or a *universum jus*. Every exception of the kind here pointed to must presuppose the absence of any materialized and therefore external interest, in respect of the constitution of the particular right and duty. In other words, whatever right or duty is not

mediated by the notion of property lies outside the compass of the definition. It follows that where a jural relation—like that of husband and wife, for example—involves a number of rights and duties, some of which do, while others do not, root themselves in the notion of property, the relation, as such, cannot be included among the elements of a *universitas juris*. Only those rights and those duties or liabilities subsisting in the marriage relation through property can be so included; and they are so included, not as incidents of marriage, but as incidents of property.

These explanations show why for the most part a *universitas* is spoken of rather as the whole of a person's estate or property than as the entire complex of his right and duties. What is tangible and visible tends to be put for what is signified.

The notion of a universal succession is that of a succession to a *universitas juris*, subject to the condition, as Sir Henry Maine points out, that the transfer has to be accomplished at a single stroke. The transfer, that is to say, has to be made, not at different intervals of time, and not through different jural capacities in the person on whom the estate is devolved. Suppose that, in virtue of a number of donations made to him one after another, a man were to become vested with all the rights and all the liabilities which formerly belonged to another man. Although in result amounting to the transfer of a *universitas juris*, this would not be a case of universal succession. The condition would not be satisfied which requires the transfer to be effected indivisibly in respect of time. Again, suppose that, in various capacities—for example, as heir, as creditor, and as legatee—a man were, even at one and the same moment, to acquire all the several parts of what formerly belonged as a whole to

another person. Although also, in result, amounting to the transfer of a *universitas juris* from one to another, this would not be a case of universal succession. The condition would not be satisfied which requires the transfer to be effected indivisibly in respect of the jural capacity of the recipient.

But for the fact that Maine in this connection speaks with unusual want of care, as if a *universitas juris* might be acquired through purchase, warning would hardly be necessary against bringing the jural capacity of purchaser into the discussion. It is true that in our law a purchaser of a single estate is called a singular successor. It is true, further, that in virtue of his purchase he comes in the place of the former owner, so far as the whole complex of rights and liabilities attaching to the particular estate is in question. But the former owner, although denuded of the particular estate—which, indeed, may be his whole estate—is, by the terms of the hypothesis, vested at once with another and generally equivalent estate. He is vested with property in exchange. This property, even when it takes a quite dissimilar form, as, for the time at least, it most commonly does, leaves him precisely where he was before as the subject of a *universum jus*. However different it may be in its component parts from that which he previously held, the estate which he receives in exchange is the same in its ideal extent. The word succession, standing by itself, properly means universal succession, and universal succession involves such a transfer of property as excludes the notion of exchange. The notion of purchase, therefore, since it implies the reciprocal transfer of a material equivalent—since, in other words, it implies a *quid pro quo*—is foreign to the notion of universal succession.

The succession of an assignee in bankruptcy to the

entire property of the bankrupt, is adduced by Maine in illustration of a universal succession. He is careful, however, to note that this is only a modified form of the primary notion, inasmuch as the assignee's liability to pay debts is measured by the amount of the assets. "Were it common among us," Maine goes on to say, "for persons to take assignment of *all* a man's property on condition of paying *all* his debts, such transfer would exactly resemble the universal successions known to the oldest Roman law." The infrequency of modern parallels to the ancient practice is easily explained. Various institutions of right, which in earlier times largely determined the everyday life of the people, no longer exist, or exist only in changed forms. Some of those institutions—like the Roman usage of adoption, for instance—have never had a place at all in some modern systems of law, such as the law of Scotland. Adoption, or, to be strictly accurate, that species of it which was called *abrogatio*, and which consisted in bringing a person who was *sui juris* under the *patria potestas* of another, carried with it the consequences of a universal succession. What may be called considerations of mere political economy were subordinated in this matter to those connected with the public advantage. In many cases the public advantage was undoubtedly served by the expedient of adoption, as where great families, just about to die out, were in this way revived. But in a country like ours, for example, where the social and political order is different, and depends for its preservation and continued well-being on very different adjustments, the case suggested by Maine is one of a kind that is little likely to be often or ever met with. Voluntary agency may be regarded as one of the distinctive features of our civilization, and few would be found willing to take the position of assignee in the case

supposed. In a *universitas juris* rights and liabilities seldom, indeed, constitute an equation. Either the rights, estimated according to financial standards, amount to more than the liabilities; or the liabilities, estimated in the same way, exceed the means of payment. Sometimes, no doubt, persons are found willing, without having definitely ascertained beforehand the relative amounts of debit and credit, to take the risk of realizing a profit by incurring responsibility for all liabilities. But, such commercial speculations apart, there is scarcely any conceivable situation in which nowadays an assignment or assignation in the terms supposed is in the least likely to be granted or accepted. Where, on the one hand, the assets are known to exceed the liabilities, there will hardly be much inclination on the part of anyone to grant such an assignation. Where, on the other hand, the liabilities are known to exceed the assets, there will just as seldom be readiness on the part of anyone to accept such an assignation.

Universal succession on the occasion of a death is that mode of universal succession which, by reason of the inevitableness in all human experience of the event of death, is the most frequent, and which, more than any other, has its permanence ensured. As between one age and another, or as between one country and another, the jural institution of transfer or devolution of a *universitas* on the death of the individual to whom the *universitas* belongs, may take on difference in respect of its incidents. But in respect of its essence, the institution remains today, in our own system of law, what it was many centuries ago in the Roman law.

When a man dies, what was his property or legal clothing of course remains. It has then to be disposed of in some way or other, so as to save society from con-

sequences of a disintegrating or hurtfully disturbing kind. It would be an injury, not only to the local community, but in the long run to the state, could the property which a man at his death leaves behind him, fall back into non-existence as property. The magnitude of the injury would in general be proportioned to the amount of property involved. At the moment of death the individual ceases to be capable of exerting any longer that will by force of which during his lifetime he was able to maintain such or such things as his property. Unless, then, the will of some one else can be put in the place of that will which has heretofore given the things in question their character as property, they must inevitably lose that character, to the corresponding detriment of what concerns the state. This is the true explanation of all laws of succession in connection with the death of the owner of property. Among civilized nations, differences are perhaps wider, more deep-rooted, more conspicuous, in this department, than in any other of the great departments of law. But differ as they may, in respect of the positive rules in which they issue, all laws of succession have for their ultimate object the avoidance of that injury to society which would ensue on every removal of the individual from his place, were provision not made for the devolution on some one else—or on some more than one, as may happen—of his whole legal substance, as represented, on the outward, material side, by his whole property or estate.

It can now be understood that by a *haereditas* is meant a *universitas juris* viewed in reference to its transfer from one person to another on the occasion of the death of the former.

Succession, accordingly, as the word is almost always used in modern law language, may be defined as the acquisition of a *haereditas*. There are not with us, as there

were with the Romans, various species or various occasions of universal succession. We have just the one which they distinguished as inheritance, and which they defined as a succession to the entire legal position of a person deceased. *Haereditas est successio in universum jus quod defunctus habuit.*

The person becoming clothed or invested with the dead man's rights and liabilities is in modern, as well as in ancient naming, the heir. The legal character of the heir remains the same whether he take on intestacy or be named by a will. Further, it makes no difference, theoretically, whether the heir be one person or more than one.

Our constitutional maxim, *rex nunquam moritur*, throws light on the Roman notion of inheritance. When the occupant of the throne dies, his status is at once devolved on his successor, and the continuity of sovereignty is considered not to have suffered any break. So with the transfer *mortis causa* of a *universitas juris.* Inasmuch as a man had in early law no status apart from the family group to which he belonged, the *universitas* which at his decease passed to his heir was just, in other words, the headship of the family. It was the rights and the duties involved in the *patria potestas.* Of course the transfer of rights and liabilities carried with it the material property in connection with which they subsisted. But, as Maine points out, the earliest expressions of Roman law with regard to what passed in inheritance from the dead man to his heir show that what so passed was the family, and they either make no mention at all of the material property, or they refer to it as an accessory of the family.

Since the property under the control of the domestic chief was the property of the family, and was not that of the particular person, who for the time being, and in virtue of his representative character, had the management and

the disposal of it, the natural or logical result of the death of that person was to vest the inheritance in those of his direct descendants who were subject to his *patria potestas*. If there were several such they succeeded as his co-heirs. If there were only one, that one succeeded to the whole. But if at the death of the *paterfamilias* there were no one of the class now described in existence, then, according to the principle of agnatic kinship, the nearest agnate succeeded. The nearest person, that is to say, or class of persons, succeeded who had been, or who might have been, under the same *patria potestas* with the deceased. No share of the inheritance would ever pass to any relative connected with the deceased through females. On failure, finally, of nearer kindred, the inheritance devolved on the collective members of the dead man's *gens* or house.

Now this scheme of succession was not only the strictly logical outcome of the principles on which the family in ancient times was constituted. So far as the evidence enables us to make out, it was in point of fact the invariable rule of the early Roman law, from which, till a later period in the history of that law, no escape was possible. But consider how this rule of succession would operate in what must have been a frequent experience. Whereas, as we have seen, the family might, on the one hand, to all legal effects and purposes whatever, be enlarged by the practice of adoption, so, on the other hand, it might be made smaller by the reverse process of emancipation. A son, emancipated by his father, became *sui juris*. He became, that is to say, free from the *patria potestas* to which he had hitherto been subject. He thus became capable forthwith of himself exercising *patria potestas* in respect of a new family. By reason of his emancipation he was cut off absolutely from the kinship of the family to which he belonged by birth or perhaps

by adoption. On the death, therefore, of the head of the family, the emancipated son was excluded from any share in the inheritance which then fell to be taken up. Now, the object of a father in emancipating a son was undoubtedly to confer on him some special benefit only thus to be secured. The children, liberated in this way from the paternal power, would be the children most of all beloved. Yet the legal consequences of the enfranchisement was to debar them from participating to any extent in the inheritance to which otherwise they would have had a right. This was a consequence altogether at variance with the sentiment of affection or preference which still presumably survived, although it had led the father to emancipate the son, and which, if it survived, inevitably revolted against the compulsory disinherison of the son in favour of others or another who might be less near and much less dear. In the attempt to defeat this legal but repugnant consequence of emancipation, the will or testament originated.

Thus, from the course of development taken by the Roman law of succession, we find historical support for what is the logical truth, that in the regulation of succession the will which operates is at first the public will alone, and afterwards, but only alternatively, though perhaps more frequently, under sanction of law, the private will of the expiring owner of the property.

Succession *ab intestato*, or devolution of a *haereditas* by force simply of law, was the original, and for a long time the only, mode of transferring property from the dead to the living. Succession *ex testamento*, or devolution of a *haereditas* in accordance with the will of him whom death was about to denude of his property, was a mode of transfer sanctioned later by the public will, as a means of remedying what in particular cases turned out to be the

inequitable consequence of a rigorous application of the rules which had been established as equitable in general.

Testamentary succession is often spoken of as if it were a more ancient institution than intestate inheritance. On this view it is only in default of a settlement by the will of a deceased proprietor that the law has intervened to say how his estate shall be disposed of. In some of the books most familiar to the profession, it is stated, as if it were an axiom not requiring to be argued or proved, that when the proprietor has neglected to dispose of his heritage or his movables by gratuitous deed, under certain restrictions resulting from the interests of his widow or children, the law supplies his omission, and disposes of his estate and effects in the way in which it is presumed that he would have himself disposed of them. The rule, it is said, being once established by law, the presumption is strengthened where a person has executed no settlement, since that is equivalent to a declaration that he means to allow the law to take effect.

But the researches of Sir Henry Maine and others prove that succession *ab intestato* comes before the posthumous distribution of property by the will of the deceased. Those researches bear out also (1) that a true power of testation was unknown in any primitive society except the Roman; (2) that whatever testamentary law exists has been taken from the Roman; and (3) that wills were never regarded by the Romans as a contrivance for parting property and the family, or for creating a variety of miscellaneous interests, but that wills were regarded rather as a means of making a better provision for the members of a household than could be secured through the rules of intestate succession.

II. DISPOSITION.—Like every other product of positive law which has its root in the remote past, the will or testa-

ment took at first a form unlike that into which it has eventually grown. More, indeed, than most jural institutions, it has changed in the process of development those features which were distinctive of it at first. Not one, as Maine points out, of what we are accustomed to think of as the characteristics of a will or testament is to be found in the primitive type. On the contrary, all the characteristics of the ancient will or testament are exactly the opposite of those with which we are familiar. In the modern conception of it, a will is a deed which does not take effect until the death of the testator, which is secret, and which is revocable during the testator's life. In its earliest form a will took effect at once, was neither executed in secret nor kept secret from those whom it concerned, and was not capable of being revoked.

The early Roman testament *per aes et libram* was in form a sale, with all the ceremonies which accompanied that transaction. It was an out-and-out conveyance to a purchaser. The purchaser was the person whom the testator, in the character of seller, wished to make his successor. Because, then, of its being an unqualified or absolute conveyance, the early testament was not revocable. Further, the will took effect at once. Even although the testator survived his act of alienation for a long time, the inheritance, which was the subject of the conveyance, vested immediately in the heir. Lastly, the testament was not secret, for the *familiae emptor*, the purchaser of the estate, was by virtue of the purchase, though the price was of course purely nominal, himself the heir, and he knew precisely what his rights were.

In the case where the death of the testator is in question, the *conditio*, it has been held, applies, not to personal legacies where there is no substitution, but only to provisions and settlements. Thus, where a man, being at the

time childless, makes a settlement of his whole estate, heritable and movable, giving a liferent of it to his wife and the fee to his brother, whom failing to a stranger; and when shortly before the man's death a child is born to him, the implied *conditio* renders the settlement inoperative, and throws both wife and child back on their legal rights. The same result would have been produced had the child, instead of being born shortly before the father's death, been born posthumously. But had the child been born a considerable time before the father's death, so as to give him the opportunity of making a new settlement, then, in the event of no such new settlement having been made, or of the old one not having been revoked, the presumption of law, or the implied *conditio si testator*, would be held not to apply.

The beneficial interest conferred on any person by a deed of settlement, or by a testamentary deed, is said to vest in the person when by the rules of law the subject of the grant comes to be at his disposal, or, in the event of his dying without exercising the *jus disponendi*, goes as part of his estate to his representatives at law.

Whether the subject of a bequest be heritable or movable property, the rules of vesting are the same. In determining whether the beneficial interest has vested or not, the intention of the granter of the deed under which the interest arises is the first thing to be considered. The application of this governing principle results in a number of generalizations more or less adequate to the variety of indications of intention afforded by different cases. But the intention of the granter, even when it is express, will not receive effect if (*a*) it be contradicted by the technical meaning of the operative words of the deed, or if (*b*) the manner in which the granter requires his intention to be carried out be not in accordance with law.[1]

[1] Logan's *Transactions*, 17 R. 425.

A *mortis causa* deed may declare, not only when bequests are to be payable, but also when they are to vest. The insertion of such a clause is a prudent precaution, but it is one that is too often neglected. If there be no express declaration, anything in the deed serving to indicate the mind of the testator on the subject will carry weight, sufficient, where the indications are at all clear, to determine the question. Thus, *e.g.*, the long postponement of the time of payment of a legacy, the providing of a destination over the bestowal of discretionary powers on trustees, are facts from which a tolerably certain inference can be drawn as to the intention of the testator. Where there is neither an express declaration nor *data* in the deed capable of being construed into an inference, the general presumption of law is in favour of the vesting of bequests *a morte testatoris*, no matter whether the persons to whom the bequests are made be individuals mentioned *nominatim* or be called as members of a class, and no matter whether they survive the term of payment or predecease it. . . . If a liferent be given to one person and the fee to another, the mere fact of this being done does not hinder the fee from vesting *a morte testatoris*; but a presumption is raised against the vesting of the fee as at that date, if there be an ulterior destination of the fee. Thus, where a testator destined the residue of his estate, in the event—which came to pass—of two liferentrices dying without issue, to his own nearest heirs in movables, the division always being *per stirpes* and not *per capita*, the Court by a majority decided that there was no vesting *a morte testatoris*, and that the legatees were the persons who were the nearest heirs at the time when the fee of the residue vested—that is to say, at the date of the death of the longer liver of the liferentrices.

Previously to the last day of 1868 the owner of heritage had no power to bequeath such property by a *mortis causa*

deed, to take effect at his death. The devolution of his heritage at his death took place according to the legal order of succession, unless he changed that order by a deed which contained dispositive words of conveyance *de presenti* or words of substitution following such dispositive words. The technical word "dispone" was essential to the validity of such a deed. To prevent the deed from becoming at once operative, the granter kept it in his own possession, and, to meet the objection that it was an undelivered deed, he inserted a clause dispensing with delivery. Incompetent to carry heritage, a testamentary deed did not even impose on the heir at law any liability which he was bound to implement. Nevertheless at common law a deed, though in form a testament, might be effectual as a conveyance of heritage, provided it contained dispositive words *de presenti*. Further, though a proprietor could not dispose of Scots heritage by will, a marriage contract was, by force of the obligation entered into between the parties, effectual under the old law as a conveyance of heritage, notwithstanding that it contained merely words of provision and not dispositive words *de praesenti*.

Since the last day of 1868 the owner of heritage has had power to settle the succession to it, not only by conveyance *de praesenti*, but also by testamentary or *mortis causa* deeds.[1] Since that date he has not been required in a testamentary deed, and since 1874 he has not been required in a *de praesenti* deed to use technical words like dispone, nor even words of direct conveyance or gift.[2] But he must use words which specify clearly what is meant to be conveyed, and which are applicable to land. Neither, for example, a general bequest of "effects," nor a direction to an executor to divide "the residue of the estate," is held to cover or

[1] Titles to Land Consolidation Act, 1868.

[2] Conveyancing Act, 1874.

carry heritage. A bequest of "goods, gear, debts, effects, sums of money, heritable and movable," has been held not to be a conveyance of land.[1] At the same time it was allowed that circumstances and subsequent actings might aid in the construction of the deed. In a later case the words "means and effects," used in a certain connexion, were held to carry heritage.[2]

Under the earlier law the heir in possession was practically no more than a liferenter. He had a right to the annual produce of the estate, but in the use of it was restricted to the ordinary rules of management. He could not, for example, grant feu charters, nor could he grant leases of more than ordinary duration, no matter how much such grants might have been for the benefit of the estate, because the making of them might have been prejudicial to the position of his successor. Nor could the heir in possession borrow for any purpose on the security of the estate. He could not even burden it with provisions to his widow and children.

These restrictions, amounting to a complete withdrawal of land from commerce, came, more especially after the Union, to be felt as obstructive of economic progress. Accordingly, the rigour of the law of entail has by degrees been relaxed by a series of statutes beginning with the Entail Improvement Act, 1770, commonly called the Montgomery Act, and ending, so far as the process has gone, with the Entail (Scotland) Act, 1882. The outcome of this legislation is that heritage can no longer be tied up for any greater period than during the lifetime of a person in life at the date of the deed of entail, and till his successor, if not major at his death, attain his majority.

An heir of entail may, under authority of the Court,

[1] Farquharson, 1883, 10 R. 1253.

[2] Forsyth, 15 R. 172.

sell the estate and have the price invested for behoof of himself and the succeeding heirs of entail (Act of 1882). Or he may disentail, with or without consents of the next heir. Even where he neither sells nor disentails, he may deal with the property in the way of excambing, of feuing out, of granting long leases, of charging the estate for improvements, or of granting provisions for widow and younger children. These provisions he may grant by annuity up to one-third of the free rent in the case of a widow, and capital sums to the younger children calculated on the free rent for one, two, or three years according to the number of the children.

The heir in possession is not in general entitled to deal with the mansion house, nor to cut down growing timber which is required for the reasonable enjoyment of that house. He is entitled to thin plantations in ordinary course, and to dispose of mature wood. He is entitled also to work the minerals himself, and he may even lease them out on terms not obviously to the prejudice of succeeding heirs.

The statutory powers conferred on heirs of entail in possession have practically rendered obsolete the law as to contravention of the fetters of an entail. By contravention is meant the breaking of any of the three cardinal prohibitions against alienating any part of the estate, charging it with debt, or altering the order of succession. It has been made so easy to remove those fetters, that there is hardly any conceivable situation in which the heir in possession will take the consequences of contravening. Under the earlier law an entail, once it had been duly constituted, could not be extinguished otherwise than by the occurrence of one of certain specified events; and these modes of extinction still subsist, but the exercise of the power to disentail is now by far the most common mode of extinguishing an entail.

It is often desired to confer what are termed conjunct rights in the same property on different persons and their representatives. In the case of movable property the terms of the destination receive effect according to the natural meaning of the words used. But in the case of proper feudal subjects or land rights, troublesome questions have been raised as to the effect of the terms sometimes used for the purpose of conferring joint interests. In deciding such questions the Courts have professed to be guided by regard for the intention of the maker of the settlement. But under the influence of feudal theories, and also perhaps at times from other causes, the meaning put on particular destinations is far from agreeing with the natural meaning of the words.

That portion of a deceased person's property which is distinguished as *dead's part* constitutes the whole of his succession in movables. The limitation of the power of the bequest of movables, which is imposed by law in consideration of family claims, disappears when the person dies unmarried or is predeceased by spouse and children. Then the whole free movable estate is dead's part, and is carried by testament. But when the deceased is survived by spouse or child, no more than one half of the free movable estate is dead's part carried by testament, and when survived by both spouse and child no more than one-third. Free movable estate means movable estate that remains after deduction, not only of *jus relictae* or *jus relicti* and *legitim* when these rights emerge, but also of the legal claims of creditors.

Writing is essential to the making of a testament. A legacy verbally made is valid up to £100 Scots, and is known as a nuncupative legacy, but a verbal or nuncupative testament appointing an executor to deal with the estate is of no effect. The writing may be either tested

or holograph. Where a holograph writing is alleged to be a will, it is often difficult to determine whether it indicates a completed intention, or is simply a memorandum of what the person deceased had in mind to do at some later date. In ordinary circumstances, such a holograph writing will be sustained as a testament, although it is not subscribed. Thus, where such a writing had been delivered by the testator to the person therein named his executor, in a sealed packet not to be opened till after the death of the testator, the writing was sustained. Provided a completed intention can be made out, the Court is always disposed to put what is called a beneficial construction on the writing—that is to say, to give effect to what the testator seems to have meant. The favour thus shown to writings of the kind is sometimes, but wrongly, taken to explain their being classed among privileged writings. Privilege, as an attribute of testaments, relates, not to their subject-matter, but to their being held valid independently of formal execution.

The nomination of an executor is not an essential of a testament, but it is a proper and usual feature. It means the appointment of a person as trustee, to hold and intromit with the whole movable estate for behoof of all who may have interest. Here the whole movable estate does not simply mean the dead's part, but also the *jus relictae* or the *jus relicti* and the *legitim* fund, though only the dead's part is within the power of the testator to deal with.

Before 1855, executors-nominate had a right to retain as their own one-third of the dead's part, "all debts being first paid," which was construed to cover legacies as well as ordinary debts. A legacy left to the executor was counted *pro tanto* towards his third. The beneficial claim of executors-nominate, as such, was abolished by sec. 8 of the Intestate Moveable Succession Act, 1855. If no executor

be nominated, the law provides one. If an executor be nominated, but receives no instructions as to how he is to dispose of the estate, and if there be no disposition of the estate to him, he has to divide the estate in accordance with the rules of intestate succession.

A codicil is a writing subsidiary to, and separate from, a testament. It does not need to be written on a separate paper, though it is, in the idea of it, a separate writing. It serves to add to, or to take away from, or to alter the provisions contained in the leading deed. A legacy given in a codicil is as effectual as one given in the testament to which the codicil is ancillary. For the rest, there is no difference between a testament and a codicil.

No testamentary writing can take effect till the death of the testator; but in the meantime it is capable of being changed again and again. This is why, when it becomes operative, it is called his last will, and why, in the absence of any indication of a contrary intention, it is held to speak as from the death of the maker of it. A clause in a will declaring it to be irrevocable is of no effect. A testator may at pleasure revoke any will or codicil made by him. He may tear up or destroy the document, or let some one else do so. He may execute a subsequent will or a subsequent codicil, and such subsequent writing serves to revoke any previous testamentary deed, in so far as, but no further than, the prior one is inconsistent with the later. If two or more testamentary writings of different dates are capable of being all given effect to, the Court will sustain them all. If the first will be revoked by a second will, and if the second will be expressly revoked, the effect is to revive the first will if it be still in existence and no subsequent disposition *mortis causa* be executed. The birth of a child to the testator either shortly before the testator's death or posthumously, is, as we have seen,

effectual to revoke a will, in respect of the implied condition *si testator sine liberis decesserit.*

A bequest of movables confers on the beneficiary the right to the subject-matter of the bequest, but does not confer on him the title. The title has to be acquired by an executor under the authority of the Court. The right of the beneficiary consists in a claim against the executor, to pay or convey to him the subject bequeathed. A bequest of heritage by deed confers on the beneficiary both the right and the title to the property bequeathed. The beneficiary under a bequest of movables may himself have been appointed executor. In this case the distinction of characters as belonging to one and the same person makes him, as executor, account to himself as beneficiary —a predicament purely theoretical.

A legacy is defined as "a donation by the deceased, to be paid by the executor to the legatee." Every bequest of movables, whether of a person's whole free movable estate, or of a portion of it, is a legacy. Attempts to bequeath legacies by taking a bank deposit receipt in favour of two persons and the survivor have often been made, but ineffectually. A legacy requires a will, *i.e.*, a writing of the deceased, which the deposit receipt is not. The result is that while the survivor has a title to uplift the money from the bank, the money truly belongs to the real depositors or their representatives. Consequently, the executor of the deceased can recover from the survivor, the whole, or such part of the sum as may have belonged to the deceased. The beneficiary in a bequest of the whole free movable estate is termed "universal legatee." The beneficiary who takes the bulk or the residue of the estate is termed "residuary legatee."

A donation *mortis causa* has been defined as "a conveyance of an immovable or incorporeal right, or a trans-

ference of movables or money by delivery, so that the property is immediately transferred to the grantee upon the condition that he shall hold for the granter so long as he likes, subject to his power of revocation, and failing such revocation, then for the grantee on the death of the granter."[1] A decision that the gift does not need to have been made in apprehension of immediate death[2] has been strongly questioned.[3] If the donor recover, the donation is revoked by the very fact.[4] A donation *mortis causa* of heritable estate cannot be constituted otherwise than by writing. A donation *mortis causa* is usually of movable estate, and can be proved by parole, even when the value of the subject exceeds £100 Scots. Actual delivery is not essential, provided the *animus donandi* be proved. The testimony of the alleged donee requires as a rule to be supported by facts and circumstances, or by other witnesses. The cases which have been found most difficult have been cases in which deposit receipts have been handed over, or dealt with as if delivered. In such cases the Court, in deciding whether a donation was intended and made, considers the whole circumstances, including the terms of the documents.

In some respects a donation *mortis causa* is like a legacy; in others, unlike. It is like a legacy (1) in being revocable; (2) in being chargeable with the donor's debts, when there is a deficit of other funds for their payment; (3) in not affecting *jus relictae* or *jus relicti* and *legitim*; and (4) in being subject to legacy duty. It is unlike a legacy (1) in not requiring, when the subject-matter is movable property, to be instructed *scripto*, however valuable the gift may be; and (2) in being preferred to any legacy.

The surplus fund, if any, which remains after the special purposes of a settlement have been fulfilled, is termed the

[1] Morris, 1867; 5 M. 1036.
[2] Blyth, 1885; 12 R. 674.
[3] M'Nicol, 1889; 17 R. 25.
[4] *Ibid.*

residue. The disposal of the residue is in general the ultimate purpose of the settlement. The extent of the residuary interest has to be calculated as at the close of the trust management, and not as at the date of the testator's death. A destination of residue does not require any particular form of words. There is a strong presumption against partial intestacy, but a testator, though meaning to dispose of his whole estate, may fail to provide against some contingency. Unless, then, he have inserted a residuary clause adequate to any event, the lapsed interest accrues to his legal representatives.

Executors or testamentary trustees must of course be allowed a reasonable time for realizing and distributing the estate. They cannot be forced to pay away any part of the estate, either to creditors or to beneficiaries, till six months have expired from the death of the testator. Then, provided they have made proper inquiry and have reasonable grounds for believing the estate is solvent, they may pay legacies as well as debts *primis venientibus*.[1] On the completion of a year from the date of the testator's death, provided they have made due inquiry as to the existence of debts and have paid, or set aside enough to pay, all known debts, they may distribute the residue.

Practice has varied from time to time as to when legacies begin to bear interest. It used to be the rule that they did not begin to bear interest till after the expiry of a year from the date of the testator's death. Afterwards it came to be held that they bore interest from the date of the testator's death. But it seems now to be settled that where the testator has given no express directions as to the time of payment, the right to the beneficial enjoyment emerges on the expiry of twelve months from the date of his death.[2]

[1] *Cf.* M'Laren, *Wills*, §§ 2159–2161.

[2] *Ibid.*, § 1059.

# CHAPTER XII

## OBLIGATION

I. OBLIGATIONS. II. CONSTITUTION OF OBLIGATIONS.

AN obligation is the bond or tie which of necessity unites the persons who stand in a particular relation of right. This is substantially the definition given by Stair[1] and Erskine,[2] both of whom seem to have had in view the definition in Justinian's Institutes.[3] Savigny makes the nature of the tie still more clear when he says that obligation consists in the control of one person over another to the extent of certain isolated acts of the latter. Even Savigny's definition, accurate and instructive as it is, does not make explicit every point that ought to be brought out. But take it for the present as it stands. Suppose C and D to be the persons related in an obligation, C being the person who exercises control, D the person controlled. The acts of D over which C has control are described as isolated or particular; because, were all D's acts under C's control, D would not be free in respect of any of his acts. In other words, he would not be a person. To some extent the relation between C and D is restrictive of D's abstract freedom. But real freedom, freedom as realized in the state, is not to be thought of as negative of the conditions which the co-existence of persons within the sphere of

[1] i. 3, 1. [2] iii. 1, 1. [3] iii. 13, pref. to 1.

right implies. Further, however, than is required by the actual necessity of such conditions, in application to particular cases, the restraint laid on D, by reason of the obligation between him and C, ought not to go, and further than is so required it does not go, with the sanction of law. Savigny's definition means that acts on the part of D which were undetermined and contingent before the obligation was created, are determinate and necessary in virtue of the obligation. Savigny himself suggests, as he proceeds with discussion of the subject, what is needed by way of addition to his definition. Practically it comes to this: that those acts of D's over which C has control must in every case have reference, either directly or indirectly, to some outward object which has been determined as property. Since it is only in and through property that a person becomes real, or, in other words, that the mere abstract person becomes a concrete person, so as to stand within the sphere of right or the province of positive law, every relation of a person to a person, in so far as it is a jural relation or a concern of law, must be mediated by the notion of property. But a thing would not be made property, or, being so made, would soon cease to be maintained as property, were it not for the element of value which enters into the notion. Those acts, therefore, of D over which C has control, as they have reference in every case to property, must have reference to a material standard of value. In other words, the acts of D, as determined by the obligation subsisting between him and C, must, each of them, be capable of being estimated or valued according to a pecuniary standard.

PRESTATION.—The subject-matter of an obligation is always a prestation, as such,[1] a payment of some sort. A

[1] "Cours de Droit Naturel": Ahrens, ii. 212.

prestation takes one or other of two forms. It may either be of an external object or of an act. When the prestation is of an external object, an act of alienation of the thing by D in favour of C is implied. In this case the value of the thing, reduced to terms of money, is the measure of the value of the act. When, on the other hand, the prestation is of an act, an outward object is implied. Here the outward object is not D's to be alienated by him in favour of C. It is C's to be advantaged by D's act. Or, if it be not specific property of C's, it is at all events property of his in general as represented by money. When the property is specific property of C's, the value of it, less what that value would be but for D's act, is the measure of the value of the act. Thus if a thing, which is now worth £5, were worth only £4 before D began work on it, the value of D's act and work is £1. When, again, the property is not specific property of C's, but is property of his in general as represented by money, and where the presentation is of personal services on the part of D, the stipulated return for those services, or, in default of stipulation, then the remuneration usual at the time and in the district, in respect of similar engagements on the part of persons similarly qualified, is the measure of the value of the act. Viewed as one of the forms of a prestation, an act may be either positive or negative. According to this distinction, which is recognized by the best authorities, positive acts are exemplified by services, and negative acts by omissions.

Savigny's definition of an obligation may now be amended, consistently with what he himself says, so as to read thus: an obligation consists in the control of one person over another person to the extent of certain isolated acts of the latter, capable, each of them, of being estimated or valued according to a pecuniary standard.

Two elements must be thought of as necessarily present in every obligation. These are (1) a *de facto* relation of one or more persons to one or more other persons, and (2) a rule of right or law governing the relation. The *de facto* relation of persons implied in an obligation must be of a more definite kind than can be asserted of them on the mere ground of their co-existence in time and space. It owes its greater definiteness to its having direct reference to some specific object. In the state such a *de facto* relation, immediately on its emergence, assumes the character of a jural relation. But it can be thought of abstractly, and here in the meantime it is to be so thought of.

A relation of fact may in some cases originate independently of the will of the persons, who, once the relation is formed, find themselves in the position of parties. Many conditions, including all that enter into the notion of accident, can easily be figured as establishing relations of fact between persons, independently of the will of the persons as directed to that end. But relations of fact between persons, which pass into jural relations, most commonly originate in some act of will with the creation of such a relation as its object. The act of will may either be of one of the persons implicated or of both. A relation which springs from the act of one of the persons alone is illustrated by the occupancy of a thing without an owner, as giving rise to a *jus contra mundum*. Such a relation is still more evidently illustrated by the management of another person's affairs without a mandate [*negotiorum gestio*]. The act originative of the relation may itself be either just or unjust. It is just when it is in conformity with right; as, for instance, when one takes charge of the interests of another who is not in a position to act for himself. It is unjust, and is called a delict, when it is not

in conformity with right; as, for instance, when one inflicts lesion on another's person or property. A relation which springs from concurrent acts of will on the part of the persons engaged expresses the notion of contract.

The rule of right implied in an obligation is derived from whatever institutions of right the particular relation of persons answers to or represents. The institutions of right express the rational will of the community as that will is organized in the state. They are exemplified by the institutions of property, marriage, succession of the living to the dead, bankruptcy, etc. They include all the different types of law as produced by custom or set forth in statute. The applying of the proper rule of right to a given state of facts is what is meant by the juridical determination of a *de facto* relation. In most cases the rule of right is so obvious as to be applied without controversy by those whom its incidence affects. But when this is not so, the determining of the rule of right and the enforcing of its application are matters for the courts of law.

Taken separately, the constituent facts in a relation of fact, which becomes a relation of right, may be either physical facts or events or institutions of law. For the juridical determination of the matter presented the facts must be taken together or as a whole, each particular fact being viewed as a constituent and being allowed significance only with reference to the other constituents of the one complex relation, and through them with reference to the relation as a whole. So taken, the facts must be brought within the scope or under the application of a rule of law. The rule of law which governs the relation, may, at first, be only implicit within the relation; for the precise combination of circumstances, the exact case, may never before have arisen. It belongs to the judge, on a survey of all the elements present in the relation, and on a logical

construction of the established principles of right, so far as they bear on the facts, to state or lay down what the rule of law involved in the relation actually is.

The following may serve as an example of the analysis of a jural relation :—

A binds himself generally as a cautioner for the intromissions of B, a trustee, but only to the extent of £500. B fails with a balance against him of £1000. C, the creditor, receives a dividend of ten shillings in the pound from the bankrupt estate. The question arises—Is C still entitled to demand from A the £500 which the latter had guaranteed?

In order to decide whether C has a valid claim as against A, the Court is bound to take into account all the facts which are here presented in the complexity of a single combination. These, when separately enumerated, are: (1) the cautionary undertaking by A in respect generally of B's intromissions; (2) the fixed amount to which the cautioner has expressly restricted his liability; (3) the consequent credit granted by C to the trustee, and (4) the excess in the amount of the credit so granted over the sum to which the cautioner's responsibility extends. The jural relation thus originating has been further complicated by (5) the subsequent bankruptcy of the trustee; (6) the payment out of the estate of a dividend amounting to the sum for which A had become responsible; and (7) the balance of £500 still remaining due by the trustee.

I. OBLIGATIONS. — Stair's twofold classification of obligations into obediential and conventional has regard to the will by which obligations are constituted. His principle of classification in this matter is sound and fundamental. Whatever other grounds of division may be reached, obligations must be classified first of all as

imperative or voluntary, according as they are constituted by the public will alone as expressed in law, or by the exercise of the private will of the parties. Voluntary obligations must further, but still on the same ground, be divided, according as they originate in the will of either party alone or in the will of both of the parties.

Among the most important of such other grounds of division as lie in the nature of obligations, the three now to be mentioned call for special consideration. They are jural efficacy, the character of the act in implement, and the emergence of the *jus exigendi*. In respect of jural efficacy, jural obligations into actionable and non-actionable. In respect of the character of the act implied in implementing the prestation, they are divided into positive and negative. Lastly, in respect of the emergence of the *jus exigendi*, or the creditor's power to exact or enforce implement of the prestation, they are divided into pure and conditional.

1. *Division of Obligations in respect of Jural Efficacy.*— What is meant by the jural efficacy of an obligation? Theorists who make a complete separation between law and ethics contrast rights and duties which are determined by the law of nature with those which are determined by positive law. They speak of the former as imperfect and of the latter as perfect, imperfect and perfect being used respectively in the sense of unenforceable and enforceable. But the opposition between the law of nature and the positive law of any country, on which the distinction between imperfect and perfect obligations proceeds, is carried too far when it makes out positive law to be an arbitrary product of human ingenuity without support in natural law. Positive law comes to be properly explained only when it is seen to consist of

"successive historical transformations of natural law."[1] All obligations, therefore, are ultimately of one and the same origin whether they be described as imperfect or as perfect, they must all have equal efficacy for those whose life is a moral life. But not all who are members of the state are equally under moral discipline. Not all, therefore, can be relied on to discover for themselves, and having discovered to fulfil, the obligations which spring from their circumstances and activities. Hence the public will lays down a positive sanction as regards most of the obligations connected with the various relations in which persons stand to one another within the sphere of right. In virtue of the sanction thus set on such obligations, the sovereign authority of the state must employ whatever resources it has at its command for the purpose to render them effective, even when the initiative as to enforcement lies with the individual. Certain other obligations the public will leaves without positive sanction, because they are essentially repugnant of external force. Such obligations are those of conjugal, parental or filial affection; of charity; of veracity, even where falsehood harms nobody but the liar himself; or to put it shortly and in general, those summed up under the head of the private virtues.

In respect, then, of their jural efficacy, which depends on their sanction, obligations are either actionable or non-actionable.

(*a*) *Actionable Obligations.*—In every case in which the debtor disputes liability—either liability at all, or liability to the extent alleged by the creditor—the exercise of the *jus exigendi* involves an appeal to the court. This appeal takes the form of an action to have the liability judicially declared, and to have implement of the prestation, or,

[1] Stirling, *Phil. of Law*, p. 58, quoting Lassalle's doctrine.

in default of the specific implement, then damages decreed.

(*b*) *Non-actionable Obligations.*—A right and therefore a duty may be valid in itself, or as a matter of natural law, and yet be without any positive sanction. In general the cause for the absence of such a sanction lies in the nature of certain obligations as involving conditions which cannot be established by external force. But, further, in particular instances, some even of those obligations which usually have the sanction of positive law may be wanting in an element that is held essential to their being enforced. Thus, for example, where by law certain forms are requisite to the constitution of an obligation, and where in a given case those formal requisites are absent, the obligation is reduced in effect to one of natural law. The condition on which it would have been enforceable has not been complied with, or, in technical phrase, purified. Such an obligation, then, equally with obligations that are not in any case recognized by positive law, is non-actionable.

It must not be taken for granted that a non-actionable obligation can never be of any practical or legal effect. Although incapable of being made the ground of an action, a natural obligation, or an obligation which from some defect in the formalities of its constitution is treated as merely natural, has nevertheless certain limited effects. In particular, a non-actionable obligation is of possible effect to render non-actionable an obligation which would otherwise be actionable. Thus, although a person who makes payment in error is, as a rule, entitled to demand repetition of the amount, yet, where a natural obligation stands in the way, he cannot recover what he has paid.

If, again, a person become cautioner for a married woman, knowing her to be such, then, although a married woman's personal bond or undertaking of liability is null, the cau-

tioner has been held bound, in spite of his having no relief against her as principal debtor. On the same principle the *condictio indebiti* is excluded as to payments in the nature of charitable donations, as, for instance, relief under the poor law.

2. *Division of Obligations in respect of the character of the Act in implement of the prestation.*—An act, as we have seen, when it is viewed as the matter of a prestation, is described as positive or negative, according as it is exemplified by services or by omissions. The act of alienation implied, when an external object is the matter of the prestation, is thought of as positive. Obligations, then, are classified as positive or negative, according as the act in which the prestation consists, or the act which is implied in the prestation, is positive or negative. In the case of a positive obligation the subject-matter of it, or, in other words, the prestation, is so determined as to require the debtor to do or to give something in implement of the prestation. In the case of a negative obligation, the subject-matter is so determined as to require the debtor neither to do nor to give anything, but merely to be passive or patient of some restraint. Most obligations are positive. Servitudes and obligations preventive of trespass and nuisance are among the most notable of those which are negative.

3. *Division of Obligations in respect of emergence of the jus exigendi.*—Most of our law books with express or implied appeal to the Roman law divide obligations on this ground into pure, future and conditional in the sense of contingent. But because 'pure' and 'conditional' are opposed to each other as contraries, the introduction of 'future' as a mid-term, so to call it, is illogical and confusing. There is

nothing contingent in an obligation described as future. But an obligation into which no element of contingency enters is a pure obligation. Therefore all future obligations are pure.

Further, as regards an obligation described as conditional, it is not properly the obligation itself that is contingent. It is only the right of the creditor to exact or enforce implement of the prestation that is contingent. In a contract, for instance, the tie which binds the persons who are parties to the contract is of such a nature that it cannot be broken at the will or by the act of either of the parties alone. By force of the initial agreement, the debt under the contract may either be payable at once, if the creditor so demand; or it may be payable when, but not until a day certain to arrive shall have arrived; or it may depend for its becoming payable on the happening of some event which is as yet uncertain. Even in the last of these three cases, and in spite of the contingency thus introduced, the tie between the persons holds fast till the debt has been discharged by payment or otherwise.

Instead of the threefold division usually made of obligations into pure, future and conditional, where the three species are ranked as co-ordinate, a twofold division is more correct into pure and contingent, according as the emergence of the *jus exigendi* is free from dependence on the issue of an uncertain event, or is subject to the issue of such an event. Pure obligations, as thus distinguished, are then sub-divided, in respect of the time to which performance of the prestation is referred into present and future.

II. CONSTITUTION OF OBLIGATIONS.—1. *Constitution of an Obligation on the basis of the Public Will.*—The will involved in the constitution of obligations is either the public will, as expressed in law, or the will of one or both

of the parties under sanction of law. A certain *de facto* relation of a person to a person is always pre-supposed. If the persons find themselves in this relation, independently of any act of their own will directed to that result, the obligation which binds them is constituted by the public will alone. In this case the *de facto* relation is first of all to be thought of as juridically determined, and then, viewed as a relation of right, it is sanctioned as to its consequence. The consequence thus sanctioned consists in all that arises of necessity from the distinction between the *jus crediti* and the *onus debiti* with respect to the subject-matter of the obligation.

Causes external to the will of each of two persons, but giving rise to a relation of fact between the persons, which the law recognizes as a relation of right, and which by so doing it makes a ground of obligation, fall under two main heads. These are (1) the contingency of natural events, and (2) individual environment, as the product of more general relations previously established.

(1) *Contingency of natural events.*—This affects either human beings or things. As regards human beings the contingency may relate to birth, to the conditions of life, or to death. Thus, to take illustrations from the law of Scotland, we may put the following cases. Suppose Q to be at his birth a nearer heir to the lands of Oakwood than P, who has entered into possession of the estate as nearest heir at the time when the succession to O, the former owner, opened. The mere fact of Q's birth establishes between him and P a relation of fact which the law recognizes as a jural relation. This jural relation involves a liability on the part of P to denude in favour of Q, if Q's right be under a deed, or to denude in his favour if he take *ab intestato*, but in such case only if he were conceived before the succession opened. Again, suppose H and W

to be husband and wife living separate from each other under the terms of a contract of separation. Then suppose W to become insane. The mere fact of this change in the condition of W's life establishes a new relation of fact between her and H. This new relation the law recognizes to the effect of putting an end at once to the contract of separation, with whatever stipulations it may have contained. Or, again, suppose L and T to be respectively landlord and tenant under a lease. Then suppose L to die during the currency of the lease, and to be succeeded by his son S. The mere fact of L's death establishes a relation of fact between S and T. This relation the law recognizes as a relation of right, and on it grounds in the persons of S and T a continuance of the obligation that was constituted in the persons of L and T.

As regards things, the contingency of natural events may relate to the production of a thing, to a change of its quality, or to its destruction. Thus suppose M and N to be neighbours. The mere fact of the production by M of a dangerous chemical product establishes a new relation of fact between him and N, which the law recognizes as a jural relation. The jural relation involves a liability on the part of M, and a corresponding right on the part of N, the precise character of which depends on circumstances. Again, suppose P and Q to enter into a contract of hiring with respect to a movable subject, P being the lessor and Q the lessee. The mere fact of the thing becoming unfit for its proper use, owing to a supervening incapacity, and not to inevitable accident, creates a new relation of fact between P and Q. This relation the law recognizes as a jural relation, to the effect of rendering P liable to Q for any loss occasioned by the change of quality in the subject of hire. Or, again, suppose O to be the owner of a tenement, and C to be a contractor employed by him to carry out

certain alterations on it. Then suppose that before C has begun to execute the work the building is destroyed by fire. The mere fact of the destruction of the subject establishes a new relation of fact between O and C which the law recognizes to the effect of extinguishing the obligation previously created under its sanction on the basis of the contract between O and C.

(2) *Individual environment.*—Every person may be regarded as the centre of various concentric circles of persons. Those circles, then, are his environment. The mere fact of his position relatively to the other persons within a given circle, the law recognizes as a ground of obligation between him and the other persons either in general, or, according to contingency, as individuals. The obligations here in question are only such as are independent of the private will of either or both of the parties to them. Obligations originating in private will may co-exist with them as between the same parties, but claim to be considered apart. The smaller the circle, or, in other words, the closer the environment, the more definite, as a rule, are the obligations which are imposed by law, and, as regards the second party, the more apt to be individual. The smallest circle, the closest environment, is that of the family. The next is that of the municipal, or some other special, community. And then, inclusive of both, there is society at large.

Obligations are of a much more common type which presuppose such a *de facto* relation of person to person as is created, independently of the will of either of the persons, by force merely of the movement among individuals under the general conditions of social order. On a principle of division already shown to be applicable to all obligations however constituted, those now in question may be divided into two classes, according as the prestation involves on the part of the debtor a positive

or a negative act. Their specific character as positive or negative, depends on the fact that, without a valid title, such as pledge or deposit, D happens to be in possession of what belongs to C; or on the fact that D happens to be near, or has property near, property of which C is in possession on a valid title. Where D is in possession, without a valid title, of what belongs to C, the obligation constituted by force of law is a positive one. The prestation is in every case that denoted by the term restitution. Where D is near, or has property near, property of which C is in possession on a valid title, the obligation constituted by force of law is a negative one. The prestation is the avoidance of encroachment or of offensive acts.

(*a*) *Positive obligation based on the fact of possession without a valid title.*—Restitution is the duty which lies on any person who is in possession of property to which he has no valid title, to restore the property to its owner. It is chiefly in connection with movable property that the doctrine of restitution is to be explained. If without P's consent or through a mistake on his part, as to what is due by him or to whom it is due, anything which belongs to him comes into the power or the possession of Q, then Q is *ipso jure* bound to restore the thing to P. Whether as creditor or as purchaser, Q is liable in restitution whenever there is a radical defect in the title by which he holds the property or the goods. Thus, the fact that the person from whom the property was acquired was incapable of consent, because of his being a pupil, or a lunatic, or an idiot, is a radical defect. So, too, the fact that the thing has been stolen or has been obtained by violence, or has been received through mistake (say from a carrier), is a radical defect in the title by which the thing is held. In these cases, as well as in the case where a thing has been transferred or an engagement undertaken

and fulfilled on a consideration which has failed, the true owner can claim restitution or can vindicate the thing. Fraud is not reckoned among the radical defects which render the title of the acquirer null. It is classed among these unjustifiable methods of inducing consent, which, though exposing creditors to the consequences of having adopted the fraud, do not destroy the right and do not affect purchasers.

(*b*) *Negative obligation based on the fact of possession with a valid title.*—Here the *onus debiti* lies on other persons than the possessor, who, for his part, has a *jus contra mundum*. The obligation has to be considered especially, though not exclusively, with respect to immovable property. Where persons themselves, or animals belonging to them, happen to be in the neighbourhood of the property to which the obligation relates, the prestation is different from what it is when fixed property of those persons is in the neighbourhood. In the former case the duty of those persons in relation to the possessor, is the avoidance of encroachment on the bounds of the property to which he has a valid title. Any breach of such duty is spoken of as trespass. In the second case the duty of the persons in question in relation to the possessor is in addition to that first described. It consists, by reason of their being neighbouring proprietors, in the avoidance of offensive acts. Acts of this description are such acts, done on their own property, as might be lawful, were it not for the proximity of that property to the other property, but as are injurious to the other owing to the fact of neighbourhood.

There is also the constitution of an obligation, in cases where a *de facto* relation of person to person has been created by some exercise of private will. The relation so created or established, is determined as to jural character and sanctioned as to jural consequence by the public will,

as expressed in law. Obligations of this kind [already considered II. i.] may be constituted, under sanction of the public will, by the private will of either party alone, or by the private will of both parties.

2. *Constitution of an obligation on the basis of the private will of either party alone.*—Every person is presumed to know the rule of right which applies to whatever relation of fact, between himself and some other person, is produced by his act or deed. He is therefore presumed to will the jural result. In other words he creates or constitutes in the particular instance the obligation which the public will has declared to be proper to such a relation in general, and which, accordingly, in the particular instance it sanctions.

The maxim *Ignorantia juris neminem excusat* bears on the debtor in an obligation, not only when by his own act in injury of another person he has incurred the debt or liability, but also when by the act of another person to his advantage he has the debt or liability imposed on him.

There are two different ways, as indicated above, in which, under sanction of the public will, an obligation may be constituted by the will of one of the parties alone. If the act be a just act, it gives the doer of it a *jus crediti* against the other person into relation with whom it has brought him. If, on the other hand, the act be an unjust act, it gives the other person into relation with whom it has brought the doer of it a *jus crediti* against the doer. Thus without Q's concurrence, or even without his knowledge, P may act in such a way as to affect Q's property, either to Q's advantage or to his loss.

Where the circumstances are such as to make P's uncovenanted intervention reasonable—as where, but for P's intervention, Q's interest would suffer injury—and where P does not intend the outlays he has made, or the effort he has put forth for the benefit of Q, to be in the nature of a

gift, the law recognizes the relation of fact thus by P's act established between him and Q as a relation of right. The law, therefore, constitutes a claim in the person of P to be reimbursed or remunerated, which claim it will enforce at his instance against Q. Where, on the contrary, P by some act of his is the cause of injury to Q's property, a relation of fact is thereby established between P and Q, which the law recognizes as a relation of right. The law, therefore, constitutes a claim in the person of Q to be indemnified for the loss he has suffered, which claim it will enforce at his instance against P.

When the acts which originate the relation are just acts, or as they may be otherwise called, acts beneficial, they ground a *jus crediti* in the doer, and at the same time a corresponding or correlative debt in the person advantaged. The prestation in the obligation thus determined or constituted is summed up in general under the notion of recompense.

Where the acts are unjust acts, or as they may be otherwise called, acts injurious, they ground a debt in the doer, and at the same time a corresponding or correlative *jus crediti* in the person injured. The debt is to make good whatever damage may have been suffered by the person injured in respect of the acts causing the injury, whether those acts be positive or negative, whether, in other words, they be an expression of malevolent will, or be a culpable omission to act in circumstances where it was a duty to act. The liability thus set up to indemnify the sufferer is denoted by the term *reparation.*

3. *Contract: Constitution of an Obligation on the basis of the private will of both parties.*—There remains to be considered the third and last of the ways in which a relation between person and person may be constituted so as to give rise to an obligation. The will, namely, of

both of the parties may be engaged in forming the relation. Bearing in mind that property is the medium through which the will of one person is brought into manifest identity with that of another, we have to note that the community of different wills in and through a particular thing is what is meant by contract. To understand the nature of contract it is necessary to examine the acts which are implied in contract. These, as Kant states, are either preparatory or constitutive. The preparatory acts are those which are directed to the negotiating of the transaction. They are, on the one hand, offer, and, on the other hand, approval. The constitutive acts are those which are directed to the concluding of the transaction. They are, on the one hand, promise, and, on the other hand, acceptance. An offer cannot be deemed a promise so long as there is nothing to show that what is offered is a thing accounted desirable by the person to whom the offer is made. Approval, again, cannot be construed as acceptance till the thing has been not only offered but promised. Approval following on an offer warrants expectation that acceptance will follow on a promise. But neither offer nor approval, nor both together, can be of effect to complete a contract. The acts which are directed to the completion of the contract—a promise, namely, and acceptance of it—necessarily follow each other in time, "so that when the one act is, the other either is not yet or is no longer." Viewed, however, as juridical, the two acts escape the condition of time, or present themselves to thought as simultaneous. In the notion of contract they co-exist and proceed from a common will, or, in other words, from the will of the party as being at the same time the will of the other. In the case, for example, of a contract of donation, the promise of the donor implies that he, with his own will, has excluded something from the sphere of what is his and at the same

time has acknowledged it to be received into the sphere of what is the donee's. The divesting of the donor and the vesting of the donee, are not two separate and successive facts. There is no moment during which ownership of the object is interrupted. Otherwise the donee would acquire the object in this state as a thing without an owner. But the acquisition of what is without an owner is the first of the original modes of acquisition, and is contrary to the idea of a contract. The continuity thus demonstrated implies that it is not the particular will of either the promiser or the acceptor, but that it is their united will in common, which transfers what is the one's to the other. The process is sometimes figured as if first the promiser relinquished the object, or renounced his right to it, for the benefit of the acceptor, and as if then the acceptor came into the promiser's place. Or, again, the process is sometimes figured as if first the acceptor laid hold of the thing, or asserted his right to it, and as if then, the promiser withdrew his will from it. But neither of these imagined processes is true. The transfer is an act in which the object belongs for a moment at the same time to both. What is acquired by means of a contract is the promise of another person, as distinguished from the thing promised. Still, something is thus added to what the acceptor of the promise has or possesses. He has become the richer by the acquisition of an active right which he can bring to bear on the other party's freedom. This his right, however, is only a *jus contra illum* (commonly but objectionably called a *jus ad rem*), and is valid only to the effect of acting on the other party so that he shall perform something for him. A *jus contra mundum* (commonly but objectionably called a *jus in re*) in respect of a thing is not acquired in the case of a contract by the acceptance of the promise, but is acquired only by the delivery of the object promised.

All promise is relative to performance, and, if what has been promised be a thing, the performance cannot be executed otherwise than by an act through which the acceptor is put by the promiser into possession of the thing. This act is what is meant by delivery. Before the delivery and the reception of the thing the performance of the act required has not yet taken place. The thing has not yet passed from the one person to the other, and therefore has not yet been acquired by that other. Consequently the right arising from a contract is only a *jus contra illum*, and it only becomes a *jus contra mundum* by delivery.

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